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## ARTICLES

### **On the Contemporary Meaning of Korematsu: “Liberty Lies in the Hearts of Men and Women”**

*David A. Harris\**

#### ABSTRACT

*In just a few years, seven decades will have passed since the United States Supreme Court’s decision in Korematsu v. United States, one of the most reviled of all of the Court’s cases. However, similarities between the World War II era and our own have instigated a re-evaluation of Korematsu. When the Court decided Korematsu in 1944, the United States was at war with the Japanese empire, which created considerable suspicion of anyone who shared the ethnicity of these foreign enemies. Since September 11, 2001, America has faced another external threat – from the al Qaeda terrorists – and there is again a fear of those who resemble them or come from the same ethnic or, in this case, religious group. Now, many believe that the time has come to dust off Korematsu and put its principles to work. Contrary to widespread belief, Korematsu is still alive today.*

*Many jurists and scholars believe no current U.S. court today would ever use Korematsu to justify another internment. Unfortunately, the law does not support this view; Korematsu remains a present reality. Thus, if Americans wish to avoid a repetition of this dark chapter of the country’s history, something besides the law must come into play.*

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\* Professor of Law, University of Pittsburgh School of Law. I am grateful to the Asian Lawyers Committee for asking me to speak on the sixty-fifth anniversary of the *Korematsu* decision, which led me to write this Article. I would like to thank Assistant Dean for Research Mike Madison, and my colleagues, especially David Herring, for their thoughts on this Article when I presented an earlier draft at the School of Law’s Spring Faculty Colloquium. Special thanks to the staff at the Japanese American Citizens League and to Karen Narasaki of the Asian American Justice Center for their assistance in accessing historical materials. This project was supported by a Faculty Research Grant from the University of Pittsburgh School of Law.

*This Article argues that, by looking not just at the law but also at how Americans view Korematsu today, Americans have reasons to hope that, if faced with another large-scale terrorist attack, the government would not react the way it did in the early 1940s. Ironically, the basis for this assertion comes at least in part from the very damage that Korematsu caused in the 1940s and the lasting impact it has had.*

## I. INTRODUCTION

In just a few years, seven decades will have passed since the United States Supreme Court decision in *Korematsu v. United States*,<sup>1</sup> one of the Court's most derided cases.<sup>2</sup> Many Americans, even American lawyers,<sup>3</sup> know little about the details of the *Korematsu* decision<sup>4</sup> – many simply consider it not just wrong but also dead.<sup>5</sup> Nevertheless, certain similarities between the World War II era and the current one have instigated a reconsideration of *Korematsu* in a new light.

When the Court decided the case in 1944, the United States was at war with Japan, and with this came considerable suspicion of anyone who looked Japanese. Since 2001, America has faced another external threat – this time, from al Qaeda terrorists – and, once again, there is fear of those who resemble them or who come from the same ethnic or religious group. Thus, the principle of law *Korematsu* articulated no longer constitutes a relic of a past era; rather, it poses a set of live questions. Since Americans face a foreign threat from an identifiable group, can the government discriminate against that particular group, as it did in *Korematsu*? Can the government discriminate with no evidence of any particular wrongdoing by identifiable persons? Before the

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1. 323 U.S. 214 (1944). The Supreme Court handed down its decision on December 18, 1944. *Id.*

2. See, e.g., *infra* note 41 and accompanying text.

3. Constitutional law students usually know that the case concerned the internment of Japanese persons during World War II, though few of them have any more information than that. Most have never read it, and many current students will never do so, even in an excerpted form. For example, I examined three leading casebooks on Constitutional Law published in 2009. Two contain only very limited references to *Korematsu* and do not feature an excerpted version of the case. JONATHAN D. VARAT ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 777-79 (13th ed. 2009) (containing two pages on “Japanese Curfew and Evacuation Cases” that include one-half of one page on *Korematsu*); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (4th ed. 2009). The other one contains no references to *Korematsu*. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (9th ed. 2009).

4. In *Korematsu*, the Supreme Court held that the internment of the Japanese during World War II did not violate the Constitution and upheld *Korematsu*'s conviction for remaining in an area from which those of Japanese decent had been excluded. *Korematsu*, 323 U.S. at 223-24.

5. See *infra* Part II.B.

terrorist attacks of September 11, 2001 (9/11), these questions would have seemed unthinkable, but no longer. Now, many believe that the time has come to dust off *Korematsu* and apply its principles once again.<sup>6</sup> Contrary to widespread belief, *Korematsu* does not require a revival; it remains alive – it is “good law” in legal parlance. Nothing in American constitutional law would keep any branch of government from relying on *Korematsu*.<sup>7</sup>

Despite this fact, many jurists and scholars believe that no court today would ever rely on *Korematsu* to sustain something as outrageous as another internment.<sup>8</sup> Looked at closely, however, the law does not support this view. *Korematsu* remains a “loaded weapon,” just as Justice Robert Jackson predicted in his dissent.<sup>9</sup> Thus, if we are to avoid a repetition of this dark chapter in our history, something other than the law must come into play.

This Article argues that, by looking not just at the law but also at how Americans view *Korematsu* today, we can see reasons for hope: if faced with another large-scale terrorist attack, U.S. institutions would not react the way they did in the early 1940s. Ironically, the basis for this assertion comes at least in part from the very damage that *Korematsu* caused and the lasting impact it had.

Section II explores the meaning of *Korematsu* today, in the post-9/11 world, with particular attention to the question of whether an internment could happen again. Section III explains why the disaster of the internment now seems unlikely to recur, for reasons that do not spring primarily from the law.

## II. THE MEANING OF *KOREMATSU* TODAY

### A. *Korematsu*: A Brief Synopsis

In the months following the Japanese attack on Pearl Harbor, a series of executive<sup>10</sup> and military orders<sup>11</sup> and a federal statute<sup>12</sup> forced over 110,000

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6. See *infra* Part II.D.

7. See *infra* Part II.C.

8. See *infra* note 40 and accompanying text.

9. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

10. On February 19, 1942, President Roosevelt issued Executive Order No. 9066. *Id.* at 226-27 (Roberts, J., dissenting); Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). This order stated that to protect “against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities,” designated military commanders might “prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the . . . Commander may impose in his discretion.” Exec. Order No. 9066, 7 Fed. Reg. at 1407.

11. On March 2, 1942, Lieutenant General John L. DeWitt, the designated Military Commander of the Western Defense Command, which included California and a

Japanese living in the western U.S. into internment camps, seventy thousand of them U.S. citizens.<sup>13</sup> A court convicted Fred Korematsu, an American of

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large area of the western American states, issued a proclamation. *Korematsu*, 323 U.S. at 227 (Roberts, J., dissenting); Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 2, 1942). The Proclamation stated that because of the danger of invasion, espionage, and sabotage, large areas of the Western Command would come within Military Areas 1 and 2. Proclamation No. 1, 7 Fed. Reg. at 2321. The proclamation added that “persons or classes of persons as the situation may require” would, under subsequent orders, “be excluded from all of Military Area No. 1” and certain parts of Military Area No. 2. *Id.* Fred Korematsu lived in San Leandro, California, which lay in Military Area No. 1. *Korematsu*, 323 U.S. at 227 (Roberts, J., dissenting). Just three days after the enactment of 18 U.S.C. § 97a, General DeWitt instituted a curfew for some persons within certain areas of his command and began to issue exclusion orders for specific areas. *See Hirabayashi v. United States*, 320 U.S. 81, 87-88 (1943). In a proclamation on March 27, 1942, General DeWitt stated that he found it necessary “to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration” and ordered that as of March 29, 1942,

all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.

Proclamation No. 4, 7 Fed. Reg. 2601, 2601 (Mar. 27, 1942). General DeWitt followed this with a civilian exclusion order excluding all persons of Japanese ancestry, whether aliens or American citizens, from Military Area No. 1 after noon on May 9, 1942. Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 3, 1942). The order mandated that all excluded persons report to a designated assembly center. *Id.* These assembly centers were, in reality, staging areas from which the Japanese would be shipped to internment camps; no person in these centers was allowed to leave except by military order. *Korematsu*, 323 U.S. at 230 (Roberts, J., dissenting). According to Justice Roberts, who dissented in *Korematsu*, “an Assembly Center was a euphemism for a prison.” *Id.* If any Japanese person did not go to the assembly centers as ordered, the authorities could criminally prosecute that person under the statute passed by Congress, 18 U.S.C. § 97a. *See* Civilian Exclusion Order No. 34, 7 Fed. Reg. at 3967 (referencing Pub. L. No. 77-503, 56 Stat. 173 (codified at 18 U.S.C. § 97a (Supp. II 1942), recodified at 18 U.S.C. § 1383 (1952) (repealed 1976)). The Order created a specific exception for persons of Japanese ancestry in assembly centers; that is, Japanese persons who were within Military Area No. 1 but in an assembly center did not violate the law. *Id.*

12. On March 21, 1942, Congress enacted 18 U.S.C. § 97a, which said that anyone who “shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander, shall . . . be guilty of a misdemeanor.” 18 U.S.C. § 97a (repealed 1976).

13. *See Korematsu*, 323 U.S. at 241-42 (Murphy, J., dissenting).

Japanese descent, of failing to obey the internment orders.<sup>14</sup> Mr. Korematsu argued on appeal that his conviction violated the Constitution.<sup>15</sup>

The U.S. government justified the internment as a military necessity, based on the *Final Report* of Lieutenant General John L. DeWitt, the commander in charge.<sup>16</sup> The *Final Report*, General DeWitt's description and justification of the military aspects of the removal of the Japanese from the West Coast in 1942, became the linchpin of the government's argument, repeating its assertions in the government's Supreme Court brief.<sup>17</sup> With tens of thousands of Japanese on or near the West Coast, a group the *Final Report* called "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion," General DeWitt asserted that a considerable danger of espionage and sabotage existed.<sup>18</sup> Some Japanese, DeWitt stated, had actually used illegal radio and shore-to-ship signaling to aid Japanese forces.<sup>19</sup>

In *Korematsu*, the Supreme Court declared that the internment did not violate the Constitution.<sup>20</sup> Justice Hugo Black, writing for the majority, said that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [and] courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."<sup>21</sup> Nevertheless, Justice Black wrote, the Court had no choice but to defer to the judgment of military authorities.<sup>22</sup> Dissenting Justices Roberts and Murphy decried the government's actions as racism.<sup>23</sup> In his dissent, Justice Jackson agreed but went further,

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14. *Id.* at 223 (majority opinion).

15. *See id.* at 217-18.

16. *Id.* at 236-39 (Murphy, J., dissenting); U.S. GOV'T PRINTING OFFICE, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942, at vii (1943) [hereinafter FINAL REPORT].

17. Brief of Respondent-Appellee at \*11-12, *Korematsu*, 323 U.S. 214 (No. 22) 1944 WL 42850.

The Final Report of General DeWitt . . . is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Fnal* [sic] Report only to the extent that it relates to such facts.

*Id.* at \*12 n.2.

18. FINAL REPORT, *supra* note 16, at vii.

19. *Id.* at 3-4.

20. *Korematsu*, 323 U.S. at 217-18, 223-24.

21. *Id.* at 216.

22. *Id.* at 223. Black said this deference was not driven by racism, but by military necessity because of "evidence of disloyalty on the part of some" and the necessity for immediate action. *Id.* at 223-24.

23. Justice Roberts called the exclusion order "a clear violation of Constitutional rights" and a conviction based not on a finding of disloyalty but rather solely on an-

explaining that the majority's opinion posed an even greater danger than the original mistake of the internment itself.<sup>24</sup> A military commander like General DeWitt, Jackson said, "may overstep the bounds of constitutionality, and it is an incident," a serious but single occurrence with no precedential value.<sup>25</sup> The Court's bestowal of its imprimatur would invite repetition, and perhaps enlargement, of the original error.<sup>26</sup> Once the Court gave racial discrimination and the transplanting of American citizens its constitutional blessing, Jackson said, "[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>27</sup>

Almost forty years later, new evidence concerning the internment began to emerge. During research for his landmark book *Justice at War: The Story of the Japanese American Internment Cases*, Professor Peter Irons uncovered previously secret internal government documents.<sup>28</sup> These materials demonstrated that the government's claim of military necessity rested on intentional lies.<sup>29</sup> Evidence in the government's possession in 1944, and known to General DeWitt and other high officials, flatly contradicted DeWitt's assertions of Japanese disloyalty in his *Final Report*.<sup>30</sup> The government's Supreme Court

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stry. *Id.* at 225-26 (Roberts, J., dissenting). Justice Murphy's dissent stated that the exclusion order "[fell] into the ugly abyss of racism." *Id.* at 233 (Murphy, J., dissenting). Murphy noted that there was no more evidence of disloyalty among Japanese than there had been against Germans and Italians in the U.S., yet the government excluded or relocated neither of these groups; rather, it conducted individual investigations. *Id.* at 240-41.

24. *Id.* at 245-46 (Jackson, J., dissenting). Jackson said that the defendant's actions only became criminal in nature because of the Japanese heritage of the defendant's parents, violating a "fundamental assumption" of American law "that guilt is personal and not inheritable." *Id.* at 243. Mr. Korematsu's conviction was "an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign." *Id.*

25. *Id.* at 246.

26. *Id.*

27. *Id.*

28. PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* viii (Univ. of Cal. Press 1993) (1983).

29. *Id.* at viii-ix.

30. See ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001). This comprehensive source collects original historical documents on the internment, including several pages of the original version of General DeWitt's *Final Report*, referenced *supra* note 16. *Id.* at 286-316. In the *Final Report*, DeWitt stated that Japanese in the U.S. sent intelligence to Japanese naval forces offshore: a statement DeWitt *knew* to be false. *Id.* at 296; see also Memorandum from Edward J. Ennis, Dep't of Justice, to Herbert Wechsler (Sept. 30, 1944), in YAMAMOTO ET AL., *supra*, at 313. Both the FBI and the Federal Communications Commission (FCC) had categorically denied that any such radio or other type of signal traffic had taken place. Memorandum from J. Edgar Hoover,

briefs in *Korematsu* were deliberately sanitized to keep from the justices any facts contradicting General DeWitt's fabrications.<sup>31</sup> Professor Irons calls this "a legal scandal without precedent in the history of American law" that included "a deliberate campaign to present tainted records to the Supreme Court."<sup>32</sup> A congressional commission created in 1980<sup>33</sup> reported that the

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Dir., Fed. Bureau of Investigation, to the Attorney Gen. (Feb. 7, 1944), in YAMAMOTO ET AL., *supra*, at 301 (reporting that FBI investigation found no basis for reports); Letter from James Lawrence Fly, Chairman, Fed. Commc'ns Comm'n, to Francis Biddle, Attorney Gen. (Apr. 4, 1944), in YAMAMOTO ET AL., *supra*, at 303-05 (investigation found no evidence of "illicit radio signaling"). Because of this direct contradiction of DeWitt's assertions, high-ranking Department of Justice lawyers said in their internal memoranda to their superiors that DeWitt's Final Report contained "intentional falsehoods" and knowing "misstatements of fact[s]." Memorandum from J.L. Burling, Assistant Attorney Gen., War Div., (Sept. 11, 1944), in YAMAMOTO ET AL., *supra*, at 310-11. These facts make any statement by the Court that it did not note the existence of contrary evidence "highly unfair to this racial minority [if] these lies . . . go uncorrected." Memorandum from Edward J. Ennis, *supra*, at 313.

31. Both the Burling and Ennis memoranda concerned a footnote in the Solicitor General's brief in the *Korematsu* case, the first draft of which stated that General DeWitt's statements in the *Final Report* concerning the allegations of radio and light signals by Japanese Americans on American soil were "in conflict with information in the possession of the Department of Justice." Memorandum from J.L. Burling, *supra* note 30; *accord* Memorandum from Edward J. Ennis, *supra* note 30 (discussing the wording of the footnote). This would have alerted the Court to the fact that General DeWitt's *Final Report* could not be relied upon to support the argument that the internment was a military necessity. Instead, under pressure from the War Department, and without effective resistance to that pressure by Attorney General Biddle, the footnote in the Solicitor General's brief was changed and made no reference to the evidence that contradicted General DeWitt's assertions. Memorandum from J.L. Burling, *supra* note 30 (comparing the original language of the footnote with the proposed revisions); *see* Memorandum from A.S. Fisher to John McCloy, Assistant Sec'y of War (Oct. 2, 1944), in YAMAMOTO ET AL., *supra* note 30, at 316 (quoting the revised footnote). The Solicitor General presented General DeWitt's untruths to the Supreme Court as official government intelligence *with no contrary views noted, despite the vociferous internal objections* of Department's own lawyers. Memorandum from Edward J. Ennis, *supra* note 30, at 315 (arguing that the Department of Justice and the Attorney General bear responsibility for ensuring that the Supreme Court is aware of the actual facts as opposed to the falsehoods stated by General DeWitt, stating "[i]f we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose to state it. The Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight."). The record shows that the eventual deletion of the crucial information, at the behest of the War Department, was deliberate. *See* Memorandum from A.S. Fisher, *supra*.

32. IRONS, *supra* note 28, at viii.

33. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980).



internment occurred not because of military necessity but rather because of “race prejudice, war hysteria and a failure of political leadership.”<sup>34</sup>

With the new evidence and the work of the congressional commission as a backdrop, a federal court reviewed the case under a writ of *coram nobis* in 1984.<sup>35</sup> Under the writ, the court could only review errors of fact in the case, not legal errors.<sup>36</sup> Based on the evidence that “the government deliberately omitted relevant information and provided misleading information in papers before the court,” the court granted the writ of *coram nobis* and vacated Mr. Korematsu’s conviction.<sup>37</sup>

### B. Korematsu Is Dead

More than sixty-five years after the Supreme Court’s *Korematsu* decision and more than twenty-five years after the reversal of the original conviction, one might well ask what relevance the case has today. With the historical record corrected and the defendant vindicated, most commentators view *Korematsu* as a dead case. They see it as a historical curiosity, a relic of an era in which the country collectively lost its head to the toxic combination of war hysteria, xenophobia, and racism.

For example, the eminent constitutional scholar Laurence Tribe of Harvard Law School wrote that the dissenting opinion of Justice Jackson, not the majority opinion of Justice Black, has “carried the day in the court of history.”<sup>38</sup> The Commission on Wartime Relocation and Internment of Civilians went even further, stating in its report that the Supreme Court’s *Korematsu*

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34. COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (The Civil Liberties Pub. Ed. Fund & Univ. of Wash. Press 1997) (1982) [hereinafter PERSONAL JUSTICE DENIED]. The Commission spent months investigating the evidence, which became available almost forty years after the events. *Id.* at xxvii. It conducted hearings, and sometimes compelled witnesses to appear and produce evidence. *Id.*

35. *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984). Courts entertain the writ of *coram nobis* for the purpose of correcting errors in criminal convictions in situations in which other remedies are inadequate or unavailable. *Id.* at 1411. The writ of *coram nobis* applies in criminal cases in which other relief is unavailable. *James v. United States*, 459 U.S. 1044, 1047 (1982) (Brennan, J., concurring) (opinion in denial of petition for writ of certiorari explaining purpose of *coram nobis*); *United States v. Morgan*, 346 U.S. 502, 507 (1954) (writ of *coram nobis* available in civil and criminal cases); *Chresfield v. United States*, 381 F. Supp. 301, 302 (E.D. Pa. 1974) (writ of *coram nobis* applicable in cases where “neither habeas corpus nor a motion to vacate sentence” is available).

36. *Korematsu*, 584 F. Supp. at 1420. The writ functioned “to correct errors that result in a complete miscarriage of justice and where there are exceptional circumstances.” *Id.* at 1419.

37. *Id.* at 1420.

38. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 237 n.118 (3d ed. 2000).

opinion “lies overruled” by history.<sup>39</sup> A multitude of scholars has said that no court would rely on *Korematsu* today to sustain similar action by the government.<sup>40</sup>

More importantly, some members of the Supreme Court have weighed in on the issue. For example, Justice Antonin Scalia ranked *Korematsu* among the worst decisions that the Supreme Court ever made, comparing it to the universally despised *Dred Scott* case, which helped plunge the nation into the Civil War.<sup>41</sup> With the other justices opining about the case either in decisions or during their confirmation hearings, eight of the current justices of the

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39. See PERSONAL JUSTICE DENIED, *supra* note 34, at 238.

40. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1043 (2004) (stating that *Korematsu* “is bad law, very bad law, very, very bad law”) (emphasis added); Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive’s War Powers and Judicial Review*, 57 ALA. L. REV. 1081, 1096 (2006) (“[H]istory has severely criticized the [*Korematsu*] decision since the end of World War II . . .”); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2575 (2003) (“*Korematsu* might well have paved the way for future inroads on civil rights and liberties in times of crisis. But [instead, *Korematsu*] . . . has served as an object lesson in what the Court and the government ought *not* to do in future crises.”) (emphasis added); Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 196-97 (1988) (describing *Korematsu* as “overruled in fact” and stating that no “practicing lawyer today would cite the decision in a brief”); Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security – A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 530-31 (2009) (describing *Korematsu* as an infamous decision); Luppe B. Luppen, *Just When I Thought I Was Out, They Pull Me Back In: Executive Power and the Novel Reclassification Authority*, 64 WASH. & LEE L. REV. 1115, 1134 (2007) (describing courts’ low regard for *Korematsu* in terms of “[t]he deliberate, if not wholly unanimous, movement away from *Korematsu*’s central holding”); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002) (“[T]o the extent that *Korematsu* stands at all today, it stands as a deeply discredited decision.”); Jerry E. Norton, *Liberty: A Human Right, or a Citizen Right*, 36 LOY. U. CHI. L.J. 565, 572 (2005) (describing *Korematsu* as never overruled, but explicitly rejected by Congress); Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 YALE L.J. 489, 532 (1945) (pointing out five ways in which the *Korematsu* case constituted a civil liberties catastrophe); Alfred C. Yen, *Introduction: Praising with Faint Damnation – The Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV. 1, 1-2 (1998) (“History has properly judged the *Korematsu* case harshly because it memorializes the Supreme Court’s complicity in this gross violation of constitutional and human rights. . . . *Korematsu* has been permanently discredited; a mistake never to be repeated.”).

41. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (comparing the Court’s opinion in *Stenberg* to two other cases most odious in the Court’s history: *Dred Scott* and *Korematsu*).

Supreme Court have said that courts could not rely on the core principle of *Korematsu* today.<sup>42</sup>

If all of this ignominy heaped on *Korematsu* does not convince one that the case has no life left in it, one must also consider the actions of Congress and the President. In 1988, Congress enacted a bill that gave redress to Japanese Americans who suffered through the internment camps.<sup>43</sup> This statute officially apologized to the Japanese – both those who held American citizenship at the time and those who did not – for the suffering they endured due to their removal from their homes and businesses and for their internment in camps. In the words of the law, “[f]or these fundamental violations of the

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42. See Muller, *supra* note 40, at 586 n.75 (citing cases showing that Justices Scalia, Kennedy, Thomas, Stevens, Ginsburg, and Breyer have all either written or joined opinions condemning *Korematsu*). Some wonder if Justice Thomas would actually condemn *Korematsu* today in every circumstance. See *infra* notes 101-07 and accompanying text. Since Professor Muller’s article was published, four new justices have joined the Court: Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan. While a judge on the U.S. Court of Appeals for the Third Circuit, Justice Alito cited *Korematsu*: “[w]e have, at times, overreacted in response to perceived characteristics of groups thought to be dangerous to our security or way of life and condemned individuals based on group membership.” *Fraise v. Terhune*, 283 F.3d 506, 530 (3d Cir. 2002). Neither Chief Justice Roberts nor Justice Sotomayor cited *Korematsu* in their opinions as lower court judges and have not done so since joining the Supreme Court. At his confirmation hearings, Chief Justice Roberts gave a glimpse of his opinion of *Korematsu* when asked by Senator Feingold whether the case had been wrongly decided. Roberts said that, while *Korematsu* is not “technically . . . overruled yet,” the case is “widely recognized as not having precedential value” and “it’s hard for me to comprehend the argument that [*Korematsu*] would be acceptable these days.” *Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court Before the S. Judiciary Comm.* (Sept. 13, 2005), available at [http://www.asksam.com/ebooks/releases.asp?doc\\_handle=636455&file=JGRHearing\\_ask&query=korematsu&search=yes](http://www.asksam.com/ebooks/releases.asp?doc_handle=636455&file=JGRHearing_ask&query=korematsu&search=yes) (questioning by U.S. Senator Feingold). Roberts also agreed with Senator Feingold’s characterization of *Korematsu* as ranking among “some of the worst decisions in the history of the Supreme Court with *Plessy v. Ferguson* and *Dred Scott* and others.” *Id.* During Justice Sotomayor’s confirmation hearings, Senator Feingold also asked her whether *Korematsu* had been wrongly decided. *Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court Before the S. Judiciary Comm.* (July 14, 2009), available at [http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?\\_r=1&pagewanted=42](http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&pagewanted=42) (questioning by U.S. Senator Feingold). She answered, “It is inconceivable to me today that a decision permitting the detention, arrest of an individual solely on the basis of their race would be considered appropriate by our government.” *Id.* During her confirmation process, in answer to written questions, Justice Kagan reportedly condemned *Korematsu* as “poorly reasoned.” Posting of Josh Gerstein to Politico, [http://www.politico.com/blogs/joshgerstein/0710/Kagan\\_skewers\\_Japanese\\_internment\\_ruling.html](http://www.politico.com/blogs/joshgerstein/0710/Kagan_skewers_Japanese_internment_ruling.html) (July 9, 2010 15:15 EST).

43. Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 App. U.S.C. §§ 1989-1989d (2006)).

basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”<sup>44</sup> The statute also created a fund out of which previously interned individuals could receive a payment of \$20,000.<sup>45</sup> When President Reagan signed the bill on August 10, 1988, he “admit[ted] a wrong” and “reaffirm[ed] our commitment as a nation to equal justice under the law.”<sup>46</sup>

With that kind of reputation – as bad as *Dred Scott*, as big a civil liberties mistake as the country has ever made, and as clear a consensus that the dissent and not the majority got it right – one could justifiably think of *Korematsu* as a dead case, upon which no court today would, or could, ever rely. Professor David Cole, one of the strongest and most outspoken defenders of civil liberties in the post-9/11 era,<sup>47</sup> says that *Korematsu* “has not proved to be the ‘loaded weapon’ that Justice Jackson feared” and he doubts that it ever will, given that such a healthy majority of the Supreme Court’s justices have

44. 50 App. U.S.C. § 1989a(a).

45. *Id.* § 1989b-4(a)(1).

46. President Ronald Reagan, Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians (Aug. 10, 1988), <http://www.reagan.utexas.edu/archives/speeches/1988/081088d.htm>. Reagan’s comments at the signing ceremony seem less generous when read as a whole. For whatever reason, he felt compelled to add that those who perpetrated this monstrous injustice should not be blamed. “[T]he Nation was then at war, struggling for its survival, and it’s not for us today to pass judgment upon those who may have made mistakes while engaged in that great struggle.” *Id.* When President Bill Clinton apologized on behalf of the U.S. for the Japanese internment in 1993, he expressed no such reservations. Letter from President Bill Clinton to Internees (Oct. 1, 1993), [http://www.digitalhistory.uh.edu/learning\\_history/japanese\\_internment/clinton.cfm](http://www.digitalhistory.uh.edu/learning_history/japanese_internment/clinton.cfm) (“Over fifty years ago, the United States Government unjustly interned, evacuated, or relocated you and many other Japanese Americans. Today, on behalf of your fellow Americans, I offer a sincere apology to you for the actions that unfairly denied Japanese Americans and their families fundamental liberties during World War II.”). Clinton held nothing back. Like Reagan, he said that America made a huge mistake. *Compare id.*, with Reagan, *supra*. But he never said no one was to blame, even going so far as to repeat the Commission’s findings that regarded the internment as a failure of the nation’s political leadership. Clinton, *supra* (“In retrospect, we understand that the nation’s actions were rooted deeply in . . . a lack of political leadership.”).

47. Professor Cole’s scholarship on the legal issues faced by the country in the aftermath of the 9/11 terrorist attacks has been substantial, deep, and excellent. One can see this just from the books he has published since September 2001, *see, e.g.*, DAVID COLE, JUSTICE AT WAR: THE MEN AND IDEAS THAT SHAPED AMERICA’S WAR ON TERROR (2008); DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007); DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (3d ed. 2006); DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009), to say nothing of his many law review articles and writings in the mainstream press.

repudiated it.<sup>48</sup> Professor Eric Muller, who has made the study of the Japanese internment the centerpiece of his scholarship,<sup>49</sup> believes that “*Korematsu* did leave a loaded weapon lying about, as Justice Jackson feared.”<sup>50</sup> Even so, Muller agrees with Cole in substance, because “the passage of six decades may have emptied much of the ammunition from its chambers.”<sup>51</sup>

### C. Not So Fast: *Korematsu* Is Not Dead After All

But a closer look reveals that what Mark Twain once said of himself<sup>52</sup> also goes for *Korematsu*: reports of *Korematsu*’s death have been greatly exaggerated. To put the matter in the legal vernacular, *Korematsu* remains “good law” – a case that continues to stand as governing law, and which has never actually been overruled. In fact, *Korematsu* continues to serve as authority for Supreme Court rulings well into the present era. It retains more vitality than most observers either realize or admit, and, for that and other reasons discussed here, the case has continuing relevance.

#### 1. Not Overruled

The first thing to notice about *Korematsu* might seem the most obvious: no court has ever overruled the case. The Court never overturned its decision, and no lower federal court has ever refused to follow the case as law. Thus, to paraphrase Laurence Tribe’s observation,<sup>53</sup> regardless of the verdict of the court of *history*, no court of *law* has ever disturbed the case.<sup>54</sup>

But surely, observers might say, this overlooks the actions and the opinion of the court that threw out Mr. *Korematsu*’s conviction in 1984.<sup>55</sup> That

48. Cole, *supra* note 40, at 2575.

49. See, e.g., ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II (2007); ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001).

50. Muller, *supra* note 40, at 587.

51. *Id.*

52. See Mark Twain Quotes, <http://www.brainyquote.com/quotes/quotes/m/marktwain141773.html> (last visited Nov. 11, 2010).

53. TRIBE, *supra* note 38, at 236-37 & n.118 (stating that occasionally “landmark dissents [rather than the majority opinions in those cases] . . . have carried the day in the court of history”).

54. As Eric Muller points out, there is at least some reason to be happy about this fact, in the sense that no court in the past sixty years has ever faced the situation in which it *could not avoid* re-evaluating *Korematsu*. Muller, *supra* note 40, at 586. “[T]he main reason that *Korematsu* has not been overruled is that happily – and contrary to Justice Jackson’s prediction – nothing like the facts of *Korematsu* have arisen” since the decision. *Id.* “Thus, the Court has not overruled *Korematsu* primarily because it has not needed to.” *Id.*

55. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

decision cannot appear as anything but a repudiation of the Court's *Korematsu* opinion, because it even points out that the Court's 1944 opinion rested on lies and untruths.<sup>56</sup> Surely this undermines *Korematsu* – it could not possibly withstand analysis now.

However, that reading of the 1984 opinion vacating the conviction does not really grasp the essence of what the district court did: it reversed the conviction because of egregious *errors of fact* introduced into the record by the government. The 1984 decision that overturned the conviction was based on a writ of *coram nobis*.<sup>57</sup> The writ allows the reviewing court to correct errors of fact, but nothing more.<sup>58</sup> Judge Marilyn Hall Patel, who heard the petition for the writ of *coram nobis* in 1984, carefully noted that her decision reversing the conviction *did not*, in any way, change or challenge the legal principles laid out by the Supreme Court in the original *Korematsu* case in 1944.<sup>59</sup> The court's decision did not reach any errors of law.<sup>60</sup> The writ of *coram nobis*, Judge Patel said, is "not used to correct legal errors and this court has no power, nor does it attempt, to correct any such errors. Thus, the Supreme Court's decision stands as the law of this case and for whatever precedential value it may still have."<sup>61</sup> Judge Patel did what the law allowed and took the action that the facts required: she called the government's factual basis for the internment of Mr. Korematsu nothing but a combination of lies and racism without substance, as the new evidence showed, and she righted the monstrous wrong done to Mr. Korematsu by vacating his conviction. But, just as importantly, she did no more, because the writ of *coram nobis* would not allow her to do more.

## 2. *Korematsu* as the Source of Suspect Class Analysis Under the Equal Protection Clause

*Korematsu* may have a different meaning for lawyers whose careers began less than twenty years ago than it does for those whose careers began earlier. For the post-World War II generations – attorneys who came of age professionally in the 1950s and 1960s – *Korematsu* embodied the Japanese internment. But for those who came later, the case might have an entirely different primary importance. The Supreme Court has used *Korematsu* in majority opinions, concurrences, and dissents to establish the important principle that the government's use of racial distinctions in the treatment of its

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56. *Id.* at 1416-20 ("[T]here is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court.").

57. *Id.* at 1420.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* This is consistent with the case law on the writ of *coram nobis*. See *supra* note 35 and sources cited therein.

citizens is immediately suspect. *Korematsu* lives today primarily because it serves as the source of suspect class analysis and strict scrutiny. The heart of Justice Black's majority opinion began by declaring:

[A]ll legal restrictions which *curtail the civil rights of a single racial group are immediately suspect*. That is not to say that all such restrictions are unconstitutional. It is to say that *courts must subject them to the most rigid scrutiny*. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>62</sup>

If history has overruled the majority opinion and vindicated the dissenters, as Laurence Tribe said,<sup>63</sup> Justice Black's analysis of discrimination under the Equal Protection Clause still stands. Indeed, the Supreme Court's modern thinking about equal protection begins with *Korematsu*. Every subsequent case that construes the Equal Protection Clause descends directly from *Korematsu*.

For example, in the 1967 case *Loving v. Virginia*, the Supreme Court addressed the constitutionality of Virginia's miscegenation law.<sup>64</sup> The statute at issue made it a criminal offense for a white person and a black person to leave the state to marry and return to Virginia to live together as spouses.<sup>65</sup> The Supreme Court found the law unconstitutional, and its discussion of why the law violated the Equal Protection Clause put *Korematsu* in a central position. "At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,'" the Court said, quoting Justice Black's key phrase.<sup>66</sup> The statutory scheme could pass muster under the *Korematsu* standard only if the racial classifications it established proved necessary to accomplish a "permissible state objective, independent of the racial discrimination which it was

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62. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (emphasis added).

63. See TRIBE, *supra* note 38, at 237 n.118.

64. 388 U.S. 1, 2-3 (1967).

65. *Id.* at 4. The defendants, a white man and a black woman, married in the District of Columbia and then took up residence in Virginia. *Id.* at 2. The defendants plead guilty, and the court sentenced them to a year in jail; "the trial judge suspended the sentence for . . . [twenty-five] years on the condition that the Lovings . . . not return to Virginia together for [twenty-five] years." *Id.* at 3. The U.S. Supreme Court noted that Virginia's own courts had interpreted the state's miscegenation laws as necessary to assure white racial superiority. *Id.* at 7 (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)) (stating the reasons in support of the miscegenation laws included Virginia's goal of "'preserv[ing] the racial integrity of its citizens'" and preventing "'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride'" ).

66. *Id.* at 11 (quoting *Korematsu*, 323 U.S. at 216).

the object of the Fourteenth Amendment to eliminate.”<sup>67</sup> Virginia’s miscegenation law failed this test.<sup>68</sup>

*Loving*’s embrace of *Korematsu*’s Equal Protection Clause standard did not prove an anomaly.<sup>69</sup> In fact, this standard has carried over into many equal protection cases testing various contemporary claims involving racial classifications by the government. In *Adarand Constructors, Inc. v. Peña*, a 1995 case challenging affirmative action based minority set asides, the Court invoked the key phrases of *Korematsu*.<sup>70</sup> “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.”<sup>71</sup> In *Missouri v. Jenkins*, a school desegregation case, the Court relied on *Korematsu* when it declared that “we must subject all racial classifications to the strictest of scrutiny,” which was almost always fatal to the government’s action.<sup>72</sup> In *Grutter v. Bollinger*, one of the Court’s two most recent cases challenging affirmative action in university admissions,<sup>73</sup> the Court quoted portions of *Loving* and *Adarand Constructors* (both of which referenced *Korematsu*’s equal protection standard) to declare that governments cannot treat people differently based on race without a compelling reason.<sup>74</sup> In an even more recent case, *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>75</sup> Justice Thomas amplified the point in his concurring opinion. “We have made it unusually clear that strict scrutiny applies to every racial classification,” he said, citing as authority the passage in *Adarand Constructors*.<sup>76</sup> Thomas also noted that strict scrutiny applied to racial classifications as early as 1967 in *Loving*, which relied upon *Korematsu*.<sup>77</sup>

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67. *Id.*

68. *Id.* at 12.

69. *Loving* was not the first case following *Korematsu* to invoke the suspect class – strict scrutiny standard, even if it is now the best-known case of the civil rights era to do so. *Loving* was preceded in its use of the *Korematsu* equal protection standard by *Bolling v. Sharpe*, the school desegregation case based on the federal Fifth Amendment that accompanied the Supreme Court’s decision in *Brown v. Board of Education*. 347 U.S. 483, 498-99 (1954) (“Classifications based solely upon race must be scrutinized with particular care . . .”).

70. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214-15 (1995).

71. *Id.* at 214 (quoting *Korematsu*, 323 U.S. at 216) (alteration in original).

72. 515 U.S. 70, 121 (1995) (Thomas, J., concurring). Justice Thomas noted that *Korematsu* and *Hirabayashi*, the Japanese curfew case which preceded *Korematsu*, were the only two exceptions to the “fatal in fact” rule at the time the case was decided. *Id.*; see also *Korematsu*, 323 U.S. 214; *Hirabayashi v. United States*, 320 U.S. 81 (1943).

73. The other was *Gratz v. Bollinger*, 539 U.S. 244 (2003), a companion case to *Grutter*.

74. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

75. 551 U.S. 701 (2007).

76. *Id.* at 758 & n.10 (Thomas, J., concurring).

77. *Id.*



Thus, even though it seems a bit paradoxical, *Korematsu* lives as a vital part of the modern equal protection jurisprudence. The case and its direct descendants still show up in contemporary cases.<sup>78</sup> Of course, when current decisions cite *Korematsu*, they do so not to show acceptance of racial discrimination but to support discussion concerning the odiousness of these practices. Thus, for current law students reading only modern cases, *Korematsu* will stand out as one of the great cases presaging and supporting the dawning of the civil rights era. As Professors John Nowak and Ronald Rotunda wrote, “[i]f you only read the cases citing *Korematsu*, and not *Korematsu*, itself, you would never know Mr. Korematsu lost.”<sup>79</sup>

#### *D. The Direct Rehabilitation of the Korematsu Legal Principle*

Perhaps it might seem troubling to see *Korematsu* as a continuing source of modern equal protection law, with very little discussion in modern cases of the actual outcome of the case and the injustice it sanctioned. But it is even more disquieting to find that the central holding of *Korematsu*, that the government may hold and intern persons of one ancestry for the sake of security, also lives on. What’s more, these sentiments have not come from the fringe, but from some of the most influential jurists of our time.

We can see this in the work of the late Chief Justice William Rehnquist, who served on the Court from 1971 until his death in 2005. In his 1998 book *All the Laws but One: Civil Liberties in Wartime*, Chief Justice Rehnquist wrote two chapters on the Japanese internment and its aftermath.<sup>80</sup> His discussion of the internment, the government officials and military actors who made it happen, and the *Korematsu* decision seemed curiously restrained. In his book, Chief Justice Rehnquist exhibited some discomfort with certain aspects of the case, particularly that the internment included Japanese American citizens (as opposed to just resident aliens)<sup>81</sup> and that similarly situated Germans and Italians did not suffer the same treatment.<sup>82</sup> Yet Chief Justice Rehnquist did not expressly condemn the internment either; rather, he called the internment “the least justified” (but apparently justified nonetheless) infringement on civil liberties in wartime.<sup>83</sup>

Chief Justice Rehnquist seemed particularly forgiving of the officials who made the critical decisions leading to the internment. General DeWitt

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78. See Yen, *supra* note 40, at 2 n.6 (1998) (noting that, as of 1998, many hundreds of judicial opinions cited *Korematsu*, but only a very tiny number of these questioned or criticized the decision).

79. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 393 (5th ed. 1995).

80. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME chs. 15-16 (1998).

81. *Id.* at 206-10.

82. *Id.* at 210-11.

83. *Id.*

and his military officials “were not entrusted with the protection of anyone’s civil liberties” and were not the ones who “first recommend[ed] evacuation.”<sup>84</sup> Secretary of War Henry Stimson and his deputy John McCloy could have done more, but “concern for civil liberties was not their responsibility.”<sup>85</sup> Chief Justice Rehnquist had no criticism whatsoever for the Department of Justice (DOJ).<sup>86</sup> His lack of criticism is remarkable, considering his comments came *more than ten years after* Peter Irons’ book revealed General DeWitt’s unambiguous, knowing lies and the DOJ’s knowing presentation to the Supreme Court of untruths about Japanese Americans’ disloyalty and treasonous behavior.<sup>87</sup> These facts became widely known not just through Irons’ book, but also through the 1984 *coram nobis* case<sup>88</sup> and through the work of the congressionally-chartered Commission on Wartime Relocation and Internment of Civilians.<sup>89</sup>

It boggles the mind to think that a sitting Chief Justice, in his own work on the subject, could ignore evidence of false testimony given to the Supreme Court by the highest officials in the government. Yet none of this new information rated even a bare mention by Chief Justice Rehnquist. Instead, he credited the government’s actions in *Korematsu* because of the proximity and concentration of the Japanese American population to military and other sensitive installations, such as factories and communications facilities, and found the Supreme Court’s decision at least partially, if not wholly, justified.<sup>90</sup> He wrote that the difference in treatment between Japanese, on the one hand, and Germans and Italians, on the other, would be troubling in peacetime.<sup>91</sup> But the exigencies faced by the country in wartime “do seem legally adequate to support the difference in treatment between [them] . . . in time of war.”<sup>92</sup> Commenting on *All the Laws but One*, Professor Alfred Yen described perfectly what Chief Justice Rehnquist’s words accomplished: “[p]erhaps the Chief Justice did not intend to rehabilitate *Korematsu*,” but “his reluctance to clearly criticize the internment and those responsible for it makes [its] rehabilitation more likely.”<sup>93</sup>

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84. *Id.* at 204.

85. *Id.*

86. However, Chief Justice Rehnquist was willing to cast *some* blame. The only ones bearing responsibility, in Chief Justice Rehnquist’s view, were the public and groups like the ACLU, because they did not oppose these moves with sufficient strength. *Id.* This proposition is curiously out of sync with Chief Justice Rehnquist’s own sentiment that the military was owed full deference by every branch of the government in *Korematsu*. *Id.* at 205. He did not explain how a more determined ACLU or other groups of citizens would have made any difference in such a context.

87. See *supra* notes 28-32 and accompanying text.

88. See *supra* notes 35-37 and accompanying text.

89. See *supra* notes 33-34 and accompanying text.

90. REHNQUIST, *supra* note 80, at 211.

91. *Id.*

92. *Id.*

93. Yen, *supra* note 40, at 7.

Purposeful or not, Chief Justice Rehnquist's comments do not stand alone in terms of moving *Korematsu* toward wider acceptability. Among judges *not* sitting on the U.S. Supreme Court, few have the influence of Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit. President Reagan appointed Judge Posner to the Seventh Circuit in 1981.<sup>94</sup> Posner is not just a high-ranking jurist; he is in every sense a respected public intellectual.<sup>95</sup> In May 2001, *Harper's Magazine* published Posner's comments on *Bush v. Gore*,<sup>96</sup> in which the Supreme Court ended the Florida vote disputes and gave George W. Bush the presidency.<sup>97</sup> The article, a transcribed debate between Posner and Professor Pamela Karlan of Stanford Law School, focused entirely on *Bush v. Gore*, its aftermath, and its implications.<sup>98</sup> None of this had anything to do with *Korematsu* until Professor Karlan said that she did not believe that *Bush v. Gore* would "go into the canon of disastrous law" like *Korematsu*.<sup>99</sup> In reaction, Posner defended *Korematsu*:

Actually, I think [*Bush v. Gore*] is like *Korematsu*, but then I actually think *Korematsu* was correctly decided. In 1942, there was a real fear of a possible Japanese invasion of the West Coast. I believe there had actually been some minor shelling of the Oregon coast by a Japanese submarine. Unquestionably, the order excluding people of Japanese ancestry from the West Coast was tainted by racial prejudice. On the other hand, many Japanese Americans had refused to swear unqualified allegiance to the United States. Good or bad, it was a military order in a frightening war. Although the majority opinion, written by Justice Hugo Black, is very poor, the decision itself is defensible. The Court could have said: We interpret the Constitution to allow racial discrimination by govern-

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94. Linda Stute, *Reagan, Bush Leave Conservative Stamp on Fed Courts Across U.S.*, CAP. TIMES, June 9, 1992, at 1C.

95. Without even looking at his many law review articles, essays, and op-ed pieces, Judge Posner's books give one a sense of the intellectual breadth and depth he possesses. See, e.g., RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009); RICHARD A. POSNER, *LAW AND LITERATURE* (3d ed. 2009); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* (2007); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); RICHARD A. POSNER, *OVERCOMING LAW* (1995); RICHARD A. POSNER, *SEX AND REASON* (1992); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

96. 531 U.S. 98 (2000).

97. Pamela S. Karlan & Richard A. Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER'S MAG., May 2001, at 31.

98. *Id.*

99. *Id.* at 38.

ment when there are urgent reasons for it, and if the military in the middle of a world war says we have to do this, then we're going to defer, because the Constitution is not a suicide pact.<sup>100</sup>

Judge Posner deserves credit for straightforwardness, especially for a sitting judge. He does not hedge his position or try to sidestep its difficult implications, and he admits to the decision's racism, which Justice Black denied. When the military and civilian powers act in an emergency during a time of war, the courts must defer to military judgment, even if those actions would clearly constitute racial discrimination that would violate the Equal Protection Clause. To Posner, *Korematsu*'s central principle and result remains not just alive but also correct – in similar circumstances, the President and the military would have full legal authority to intern civilians again.

Justice Clarence Thomas has given *Korematsu* renewed currency. Thankfully, a situation identical to *Korematsu* has not presented itself to the Supreme Court.<sup>101</sup> Justice Thomas has, however, discussed *Korematsu* in a positive way in the context of the nation's current security concerns. In *Grutter v. Bollinger*, in which the Court upheld the admissions system at University of Michigan Law School,<sup>102</sup> Justice Thomas wrote his own opinion, concurring in part and dissenting in part.<sup>103</sup> In that opinion, Justice Thomas said that governmental discrimination offends the Equal Protection Clause under the strict scrutiny test that originated in *Korematsu*.<sup>104</sup> He quoted the majority in *Korematsu*: “[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can.”<sup>105</sup> Justice Thomas continued by pointing out that *Korematsu* represented one of only two situations in which the Supreme Court had ever approved of racial discrimination for a pressing public necessity.<sup>106</sup> Thus, to Justice Thomas, the central teaching of *Korematsu* retains significance. “[T]he lesson of *Korematsu* is that national security constitutes a ‘pressing public necessity,’ though the government’s use of race to advance that objective must be narrowly tailored.”<sup>107</sup>

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100. *Id.* at 39 (emphasis added). Judge Posner made similar comments about *Korematsu* in a subsequent book. RICHARD A. POSNER, *BREAKING THE DEADLOCK* 170-74 (2001).

101. *See supra* note 54.

102. 539 U.S. 306, 343 (2003).

103. *Id.* at 349-78 (Thomas, J., dissenting).

104. *Id.* at 351.

105. *Id.* (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)) (alteration in original).

106. *Id.*

107. *Id.*

### E. *Could Korematsu Happen Again?*

#### 1. The Possibility Is Real

In his dissent, Justice Jackson framed his objection to the Court's decision in *Korematsu* as a dire warning that the principle enshrined in the case would constitute a "loaded weapon" ready for use whenever the government can point to an urgent need.<sup>108</sup> Many thoughtful commentators now discount the danger Justice Jackson saw,<sup>109</sup> but their views do not withstand analysis. The question of *Korematsu*'s resurrection, and even the possibility of another internment, no longer constitutes idle speculation. The post-9/11 climate has transformed the significance of *Korematsu* from a decision that might, in the past, have seemed a mere academic exercise into a standing precedent with potentially profound consequences. An incident in 2002 illustrates this point.

On July 19, 2002, the U.S. Commission on Civil Rights held a hearing near Detroit to hear Arab American and Muslim leaders' complaints concerning discriminatory treatment after the attacks of September 11, 2001.<sup>110</sup> Southeast Michigan, especially the Detroit suburb of Dearborn, contains one of the largest Arab American populations in the nation.<sup>111</sup> Holding the hearing there allowed the Commission to collect evidence, facts, and impressions from the largest and widest array of people and organizations affected by any post-9/11 backlash. The meeting was one of the first attended by Commissioner Peter Kirsanow, an appointee of President Bush, who had taken his seat only two months before.<sup>112</sup>

The Commissioners and the audience heard testimony from many witnesses concerning civil rights violations against Arab Americans.<sup>113</sup> As the

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108. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

109. See *supra* notes 38-51 and accompanying text.

110. Press Release, United States Comm'n on Civil Rights, Civil Rights Commission Reaffirms Commitment to Protecting Rights of Arab Americans and Muslims (July 24, 2002), <http://www.usccr.gov/press/prsndx.htm>.

111. See G. PATRICIA DE LA CRUZ & ANGELA BRITTINGHAM, U.S. CENSUS BUREAU, THE ARAB POPULATION: 2000 7, table 3 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-23.pdf>. This table shows that the Arab population of Dearborn, Michigan alone – there are also substantial Arab populations in neighboring communities, such as Sterling Heights and Livonia, Michigan – is larger than the Arab population of any city in the country except New York City. *Id.* Dearborn, a city of approximately 100,000, has nearly 30,000 Arabs. *Id.* New York City has an overall population of eight million, eighty times the size of Dearborn, and has roughly 70,000 Arabs. *Id.*

112. Roxane Ellis Rodriguez Assaf, *In Event of Another 9/11, Says Bush Appointee, "Forget Civil Rights in This Country"*, WASH. REP. ON MIDDLE E. AFFS., Sept.-Oct. 2002, at 64-65, available at <http://www.wrmea.com/archives/sept-oct02/0209064>.

113. *Id.*

hearing neared its end, a member of the audience raised the subject of the Japanese internment: would Commissioner Kirsanow give his assurance that the government would not repeat the internment with Arab Americans?<sup>114</sup> Mr. Kirsanow, who prefaced his answer by saying he believed in the protection of civil rights even in wartime, spoke directly to the possibility of history repeating itself in the post-9/11 world. “I believe no matter how many laws we have, how many agencies we have, how many police officers we have monitoring civil rights, that if there’s another terrorist attack and it’s from a certain ethnic community or certain ethnicities that the terrorists are from, you can forget civil rights in this country,” Kirsanow said.<sup>115</sup> “I think we will have a return to *Korematsu*.”<sup>116</sup> According to published accounts, Kirsanow continued this line of thought after the meeting in comments to a journalist in which he said that “not too many people will be crying in their beer if there are more detentions, more stops, more profiling. There will be a groundswell of public opinion to banish civil rights.”<sup>117</sup>

Kirsanow’s comments touched off a firestorm of criticism. Critics accused him of suggesting tolerance for, and consideration of, the idea of internment of Arabs in the fight against terrorism.<sup>118</sup> He responded by stating that his enemies had distorted his comments and that he was “unalterably opposed” to the idea of internment camps.<sup>119</sup> He had been trying, he said, to

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114. *Id.*

115. *Id.*; Andrew Chow, *Landmark APA Legal Team Demands Commissioner’s Ouster*, ASIANWEEK, Aug. 9-15, 2002, available at [http://www.asianweek.com/2002\\_08\\_09/news\\_korematsu.html](http://www.asianweek.com/2002_08_09/news_korematsu.html).

116. Chow, *supra* note 115.

117. Assaf, *supra* note 112; see also Lynette Clemetson, *Traces of Terror: Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES, July 23, 2002, at A14; Niraj Warikoo, *Panelist Foresees Internment Push*, MIAMI HERALD, July 20, 2002, at 16A; accord MARY FRANCES BERRY, AND JUSTICE FOR ALL: THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND THE CONTINUING STRUGGLE FOR FREEDOM IN AMERICA 328 (2009) (quoting Peter Kirsanow as saying that Arab Americans “should understand that an attack might give rise to internment camps such as those used on Japanese Americans in World War II” and noting that “[t]he Arab Americans in the hearing room were outraged”).

118. Press Release, American-Arab Anti-Discrimination Committee, Four Asian-American Groups Join Call for the Removal of Kirsanow from USCCR (July 30, 2002), available at <http://www.adc.org/media/press-releases/2002/july-2002/four-asian-american-groups-join-call-for-the-removal-of-kirsanow-from-usccr/> (explaining that The National Asian Pacific American Legal Consortium (NAPLC), Asian Pacific American Labor Alliance, National Federation of Filipino American Associations, and the National Coalition for Asian Pacific American Community Development had joined the American Arab Anti-Discrimination Committee, the Japanese American Citizens League, and the Leadership Conference on Civil Rights in calling for Kirsanow’s resignation); Press Release, American-Arab Anti-Discrimination Committee, ADC Calls for the Removal of U.S. Civil Rights Commissioner (July 20, 2002), available at <http://www.adc.org/index.php?id=404>.

119. Clemetson, *supra* note 117.

convey that such approaches should be condemned and that waging war on terrorism and upholding civil liberties “are not mutually exclusive.”<sup>120</sup>

Kirsanow could have chosen his words more judiciously. For a public official to raise the possibility that some Americans would not just accept, but welcome, internment camps for Arabs, in a meeting at which Arab Americans had gathered to voice their objections to mistreatment, seems the height of obliviousness.<sup>121</sup> Giving Kirsanow every benefit of the doubt, he might have been trying to say that he feared that another attack might build support for interning Arab Americans, an outcome he did not want to see. Whichever way one chooses to view Kirsanow’s words, the unfortunate truth is that the question of whether internment could occur again is no longer just an academic curiosity. Rather, Kirsanow’s comments reveal a genuinely frightening and dark fact. In the aftermath of another serious attack by extremists based in Arab or Muslim countries or, worse yet, an attack that originates with Arab or Muslim extremists who live in the U.S., some will argue that the internment of Arabs and Muslims is a necessary measure that national security demands.

I believe this possibility is real enough that, in a seminar called Criminal Justice and Homeland Security, I have given my students a hypothetical problem to brief and argue.<sup>122</sup> The problem assumes a large-scale truck bombing targeting a federal courthouse, killing hundreds and wounding thousands. Investigation revealed that two U.S.-based al Qaeda sleeper cells, consisting of both foreign-born and native-born Muslims, carried out the attack. In the aftermath, the President ordered “all persons of Arab descent” and all Muslims to report to security centers, where they will stay under military guard until cleared to leave. The question presented by the hypothetical problem concerns the President’s order: would he or she have the constitutional authority to order internment of Arab Americans and Muslims under these facts? Half of the class acts as lawyers for the government and argues for internment; the other half, representing a potential internee, argues against it.

Could something like this actually happen? Merely expressing the fervent hope that this will not occur does not answer the question. In the event of another attack under the circumstances described, a presidential response like the one outlined in the problem is not beyond the realm of possibility. The problem forces students to come to grips with this uncomfortable – and, for most, unimaginable – reality. Two points in their responses merit discussion. First, when students dig into the law – *Korematsu* from 1944, the 1984 district court opinion granting the writ of *coram nobis*, and other cases and

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120. Chow, *supra* note 115; Clemetson, *supra* note 117.

121. Clemetson, *supra* note 117 (quoting leader of the Midwest Director of the American-Arab Anti-Discrimination Committee as saying that “[f]or someone in his position to even entertain the idea of detention camps . . . it is like he is making it an acceptable debate”).

122. The full text of the hypothetical problem is available from the author upon request.

materials – they readily come to the conclusion that *Korematsu*'s core principle remains very much alive. Second, the students' briefs reveal that they grasp that the facts in the problem, parallel in so many ways to what occurred on September 11, 2001, could persuade a court to defer to the executive.

None of my students have said they would *want* an internment to take place in the event of another major attack. But when cast in the role of a lawyer for the government, they can formulate legally and factually persuasive arguments for it. I do not believe my students are unusual. If they can understand and make these arguments on behalf of a hypothetical president, so could lawyers from the U.S. Department of Justice. In *The Emergency Constitution*, Professor Bruce Ackerman says that, while *Korematsu* may constitute "very, very bad law," this does not answer the question of whether this chapter of our history might, under some circumstances, repeat itself.<sup>123</sup> "[W]hat will we say after another terrorist attack? More precisely, what will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of *Korematsu* will not be extended to the 'war on terrorism'?"<sup>124</sup>

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123. Ackerman, *supra* note 40, at 1043 (emphasis added).

124. *Id.* When one moves from the thought and opinions in the legal community to popular culture, one sees commentators with very large followings arguing that *Korematsu*'s central principle is now a necessary government tool in the war against terrorists based in the Middle East. Michelle Malkin surely ranks first among these people. Malkin, a television commentator for the Fox News Channel and a nationally syndicated newspaper columnist, describes herself as "a mother, wife, blogger, conservative syndicated columnist, author, and Fox News Channel contributor." Michelle Malkin, About, <http://michellemalkin.com/about/>. Malkin published a book in 2004 in which she was refreshingly candid about her claims. MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR (2004). With the book, she said, she offered "a defense of the most reviled wartime polic[y] in American history: the evacuation, relocation, and internment of people of Japanese descent during World War II . . . ." *Id.* at xiii. According to Malkin, she did this because of the direct connection between how Americans view the Japanese internment and current national security concerns. *Id.* Malkin believes the U.S. must have the option to use internment and related policies like racial profiling to secure itself against Middle Eastern terrorists. *Id.* at xxiv-xxvii, xxx. For Malkin, it is unfortunate that the revulsion most Americans feel for the internment of the Japanese "has become the warped yardstick by which all War on Terror measures today are judged." *Id.* at xvii. This endangers the country, she says, because if ethnic targeting or even an internment became necessary in the judgment of our leaders, soft-headed and tender-hearted Americans would object. *Id.* at xvii-xx. They would oppose these actions because they have been duped into believing that the Japanese internment was unjustified, racist, and just plain wrong – a mistake we should never repeat. *Id.* at xxxi-xxxii. The aim of her book was thus to correct the misinformation that millions of Americans have been fed about the internment, and in so doing to persuade Americans that they need to be ready to lock groups in camps if leaders tell the citizens they must do so for safety. Additionally, the cover of her book pairs an image of a Japanese man arrested in Hawaii after the bombing of Pearl



## 2. Would a Mature Equal Protection Doctrine Prevent a Repeat of *Korematsu*?

Some will object to this analysis on the grounds that the Supreme Court's Equal Protection cases decided after *Korematsu* have added an extra layer of protection against government burdens allocated by race. The years after *Korematsu*, especially the 1960s and 1970s, became the era of the full flowering of the Equal Protection Clause.<sup>125</sup> In the equal protection cases of this era, the Court fully fleshed out the strict scrutiny standard. Courts have interpreted strict scrutiny of government racial classifications to mean that racial classifications can only survive if they serve a compelling governmental need and are narrowly tailored to serve that purpose.<sup>126</sup> This usually set a standard that the government could not meet. Gerald Gunther, one of the leading constitutional scholars of the twentieth century, famously captured the essence of strict scrutiny by describing it as "'strict' in theory and fatal in fact."<sup>127</sup> Given these developments, some say an attempt by the government to create an internment in the event of another terrorist attack simply could not survive judicial scrutiny. The late Chief Justice Rehnquist made this very argument in his book *All the Laws but One*,<sup>128</sup> noting that the Supreme Court

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Harbor with one of Mohammed Atta, the leader of the 9/11 hijackers, whose picture became ubiquitous after the terrorist attacks. Although her book was widely pilloried by mainstream historians for its irresponsible use of discredited evidence without presenting any contrasting point of view, *see, e.g.*, Press Release, History News Network, Historian's Committee for Fairness (Aug. 31, 2004), <http://hnn.us/readcomment.php?id=40982>, Malkin's argument – that internment may be a reasonable response to a national security threat that the nation must remain prepared to use – has a wide audience (the book appeared on the New York Times Best Seller list) as well as mainstream public acceptance. Writing in *U.S. News and World Report*, John Leo, one of the magazine's editors, wrote that "Malkin's point is that if the threat to the survival of America is severe enough, some civil liberties must yield . . . . It is always reasonable to look in the direction from which the gravest danger is coming. It's also reasonable and important to open an honest discussion of internment, past and present." John Leo, *The Internment Taboo*, U.S. NEWS & WORLD REP., Sept. 27, 2004, available at [http://www.usnews.com/usnews/opinion/articles/040927/27john\\_2.htm](http://www.usnews.com/usnews/opinion/articles/040927/27john_2.htm). Nationally syndicated columnist Thomas Sowell called Malkin's book "sober and thoughtful" and approvingly characterized its argument: "what is called 'racial profiling' was valid then, with the country in grave danger, and is valid again today when it comes to people from the Middle East living in the United States." Thomas Sowell, *Michelle Malkin's "In Defense of Internment"*, CAPITALISM MAG., Sept. 21, 2004, available at <http://www.capmag.com/article.asp?ID=3941>.

125. *See supra* Part II.C.2.

126. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

127. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

128. *See* REHNQUIST, *supra* note 80, at 207.

could not validate an internment now as it did in the 1940s, because Equal Protection law is stronger and more well developed.<sup>129</sup> Thus, the modern Equal Protection Clause is itself a bulwark against the internment of American citizens ever happening again.

This is a powerful argument, but it overlooks the actual language of the *Korematsu* opinion. Justice Black began his opinion by addressing when, if ever, the Equal Protection Clause might allow the government to treat Americans in a racially discriminatory fashion.<sup>130</sup> He may not have used the phrases “compelling state interest” and “narrowly tailored,” but surely those principles appear in a very real sense.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>131</sup>

Only by stressing word choice over meaning and phraseology over principle can one find much difference between “compelling state interest” and “pressing public necessity.”

Justice Black then emphasized that national security clearly qualifies as among those dire public necessities that may justify upholding a government racial classification.<sup>132</sup> Justice Frankfurter’s concurring opinion, stressing the importance of judicial deference to the judgment of the military and the executive,<sup>133</sup> underscored the point. At least one current member of the Supreme Court has not forgotten this. It was just six years ago that Justice Thomas went out of his way to note that national security could, in fact, justify explicit racial discrimination by the government.<sup>134</sup> His comment drew no disagreement from other members of the Court.

Modern lawyers tend to think of the Court’s decisions prohibiting government racial discrimination over the past fifty years as sacred, echoing Gunther’s “‘strict’ in theory and fatal in fact” idea.<sup>135</sup> But at least in the arena of national security, this is not so. The Fifth and Fourteenth Amendments may say that all shall enjoy the equal protection of the law, but the glaring

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129. *Id.* (answering the question whether the internment might pass muster under the law today, Chief Justice Rehnquist said, “Under today’s constitutional law, quite certainly not: any sort of ‘racial’ classification by government is viewed as ‘suspect,’ and an extraordinarily strong reason is required to justify it.”).

130. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

131. *Id.*

132. *Id.* at 218.

133. *Id.* at 224-25 (Frankfurter, J., concurring).

134. See *supra* notes 102-07 and accompanying text.

135. See Gunther, *supra* note 127, at 8.

example of *Korematsu* demonstrates this is not always true. Some circumstances may allow for even the worst kinds of discrimination.

Judge Posner said that, in *Korematsu*, the Court reached the correct result with a terrible opinion.<sup>136</sup> The Court could have found that deference to the military in the middle of a world war justifies racial discrimination.<sup>137</sup> The inescapable fact that *Korematsu* remains good law means that Posner's view cannot be dismissed out of hand. In matters of national security, the reach of equal protection law is a question of how much Americans value equality as compared to national security in a given factual context. Put another way, vis-à-vis national security, the Equal Protection Clause contains no real anchor that will always make equality the superior value. Instead, it becomes a question of what courts care about the most.

A plausible objection to this thesis is that today's Supreme Court would not validate a *Korematsu*-like internment again, even in the event of another attack. The Supreme Court has faced four cases in which the executive branch asserted unprecedented powers to detain people in the pursuit of post-9/11 terrorism: *Rasul v. Bush*,<sup>138</sup> *Hamdi v. Rumsfeld*,<sup>139</sup> *Hamdan v. Rumsfeld*,<sup>140</sup> and *Boumediene v. Bush*.<sup>141</sup> In each of these cases, the government argued that the executive's power under the Constitution allowed the President to take extraordinary actions against "enemy combatants" in U.S. custody in order to secure the nation. Critics would surely point out that the Supreme Court rebuffed the government in all four cases, often in sweeping language that, at the very least, suggests hostility to the government's assertions of the power to incarcerate persons in the name of national security.

In *Rasul*, the Court denied the government's claim that the U.S. Naval Base at Guantanamo Bay amounted to a zone free from any judicial oversight.<sup>142</sup> On the contrary, the Court said federal courts had jurisdiction to test the claim of presidential power over individuals incarcerated there.<sup>143</sup> In *Hamdi*, Justice O'Connor, writing for a plurality, said that Guantanamo detainees have the right to due process,<sup>144</sup> finding that "a state of war is not a blank check for the President."<sup>145</sup> In *Hamdan*, the Court dismissed the idea that enemy combatants enjoyed no protections under the Geneva Convention when tried in military commissions.<sup>146</sup> In *Boumediene*, the Court preserved

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136. See *supra* note 100 and accompanying text.

137. Karlan & Posner, *supra* note 97, at 39.

138. 542 U.S. 466 (2004).

139. 542 U.S. 507 (2004).

140. 548 U.S. 557 (2006).

141. 553 U.S. 723 (2008).

142. *Rasul*, 542 U.S. at 480.

143. *Id.* at 483-84.

144. *Hamdi*, 542 U.S. at 533-35.

145. *Id.* at 536.

146. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-30 (2006).

the availability of habeas corpus for those incarcerated at Guantanamo.<sup>147</sup> Thus, critics might argue that these cases show that, whatever the legal status of *Korematsu* in the abstract, a majority of today's Supreme Court would not accept a *Korematsu*-style internment in the event of an attack.

Despite these criticisms, Americans cannot depend on these cases to tell them what a court would do if faced with another attack and a plan for internment. None of the Guantanamo cases relied upon, or even expressed any relation to, the law of equal protection; doctrinally, they rested on the President's executive and wartime powers. And perhaps more important than what these cases struck down is what they *did* allow. The best example is *Hamdi*, in which Justice O'Connor famously refused to grant the executive virtually unlimited constitutional power in wartime.<sup>148</sup> *Hamdi* actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants.<sup>149</sup> While some minimal degree of process is due,<sup>150</sup> the bottom line is that the Court conceded this power to the President with very little in the way of checks or balances. Similarly, in *Hamdan*, the Court ruled that only Common Article Three of the Geneva Conventions, the most basic set of protections available, applied to enemy combatants at Guantanamo.<sup>151</sup> *Hamdan* also found that it would be procedurally adequate for military commissions, if modified, to try these prisoners.<sup>152</sup>

If there is a relationship between the enemy combatants cases and what the Court might do if faced with a *Korematsu* decision again, it is that the Court in these cases largely – even if not entirely – *deferred to the power of the executive*. One can see the enemy combatant cases as a counterweight to *Korematsu* only by blinding oneself to the fact that the enemy combatant cases allowed indefinite detention of American citizens in the name of national security, with only minimal due process available. Thus, rather than signaling that the Court would stand in the way of another internment, a plausible reading of these cases indicates that the Court has, at the very least, **left the door open for it**.

### 3. Post-9/11 Actions by the Government: Fear with a Real Basis

It may seem that Americans worried about whether another internment could occur in the event of another attack have fallen into the grip of irrational fear. After all, almost seventy years have passed since *Korematsu*. If the

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147. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

148. *Hamdi*, 542 U.S. at 536.

149. *Id.* at 519-21 (holding that the government may hold enemy combatants, even if they are American citizens, until the end of hostilities).

150. *Id.* at 524-25, 533-36 (holding that enemy combatants may be detained without trial, but must be accorded basic aspects of due process, such as notice of charges and opportunity to be heard).

151. *Hamdan*, 548 U.S. at 629-30.

152. *Id.* at 613-22.

U.S. government did not repeat the colossal mistake of internment in the immediate aftermath of the 9/11 attacks, with their graphic images and thousands of civilian deaths, it likely never will.

It is important to be clear: in terms of damage to people by government action, nothing has happened since the events of 9/11 that even remotely approaches the catastrophe of the internment. While some have clearly experienced harm, the Japanese internment dwarfs anything that has happened in the United States since 9/11 in terms of the number of people affected, as well as the amount and type of damage done to them. Nevertheless, we cannot ignore the many parallels between the Japanese American internment and the treatment of American Muslims since 9/11. In both instances, a shadow of suspicion encompassed a whole group of people because of their ethnicity and group identity. The government's post-9/11 actions did not constitute a wholesale internment but, in light of U.S. history, were enough to make anyone in the crosshairs of these government actions feel quite uneasy. By these indicators, it is not at all implausible to say that the government had begun drifting back toward *Korematsu* in the immediate aftermath of 9/11.

In the days and weeks following the 9/11 attacks, the federal government began to round up hundreds of suspects, almost all of whom were Muslim men.<sup>153</sup> The government incarcerated these men in jails and prisons, or sometimes in immigration holding facilities.<sup>154</sup> They often endured poor conditions and harsh treatment.<sup>155</sup> The government held them for an average of eighty days, but detained some for considerably longer – a quarter of them were imprisoned for longer than three months.<sup>156</sup> The government detained them under a “hold until cleared” policy: that is, their lack of involvement in the attacks had to be proven before they might be released, inverting the presumption of innocence.<sup>157</sup> They were in custody under conditions that severely limited their access to attorneys<sup>158</sup> and family members.<sup>159</sup> It turned out that none of those arrested had connections to terrorism.<sup>160</sup>

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153. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1-2, 14 (2003) (more than seven hundred men, almost all of them Muslims, were detained in the immediate aftermath of the attacks).

154. *Id.* at 2, 17.

155. *Id.* at 112-14.

156. *Id.* at 51-52.

157. *Id.* at 37-43.

158. *Id.* at 130-38.

159. *Id.* at 138-40.

160. See *Oversight Hearing on Counterterrorism Before the S. Comm. on the Judiciary*, 107th Cong. 22 (2002). In this hearing Senator Kennedy, a Senator from Massachusetts, asked, “Isn’t it true that . . . none of the 1,200 or more Arab and Muslim detainees that were held were charged with any terrorist crimes or even certified under the PATRIOT Act as persons suspected of involvement in terrorist activity?” *Id.* FBI Director Robert Mueller responded, “Well, a specific terrorist charge of

Since most of the men incarcerated in the aftermath of the attacks were immigrants from the Middle East and South Asia, the government accomplished the round up through a systematic use of immigration law.<sup>161</sup> Not a single one of the detainees faced terrorism-related criminal charges, and the Federal Bureau of Investigation (FBI) only filed criminal charges in a few cases.<sup>162</sup> Filing criminal charges would have forced the government to provide evidence of wrongdoing and to play by the rules of the criminal justice system. Instead, the government made a conscious decision to avoid due process requirements. Attorney General John Ashcroft did not shy away from his use of immigration law and other indirect methods to detain these suspects.<sup>163</sup> He asserted that he would use every tool at his disposal to apprehend terrorists.<sup>164</sup> He likened his methods to former U.S. Attorney General Robert Kennedy's famous statement that, in order to take down the Mafia, he would see to it that gangsters faced arrest for "spitting on the sidewalk" if necessary.<sup>165</sup> Attorney General Ashcroft argued that detaining potential terrorists and holding them on little evidence and without due process in the name of combating terrorism were exactly the same as Kennedy's relentless pursuit of the Mafia.<sup>166</sup>

The government continued these actions into the fall of 2001 and spring of 2002, when the DOJ launched a program to interview 5,000 young men from Middle Eastern and Muslim nations.<sup>167</sup> The DOJ said it did not suspect the men of terrorism, and the authorities had no reason to believe they might have committed any crimes.<sup>168</sup> Rather, the DOJ wanted to interview them just in case they might know something about terrorism.<sup>169</sup> Some of the law

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somebody who was going to or had committed a terrorist act, no." *Id.* Director Mueller attempted to explain that a number of those detained had some association with terrorists, but he was contradicted by other officials. *Id.*; see also Eric Boehlert, *The Dragnet Comes Up Empty*, SALON, June 19, 2002 (quoting a Department of Justice official as saying that, among all the charges against post-9/11 detainees, "none . . . have been for terrorist activity").

161. U.S. DEP'T OF JUSTICE, *supra* note 153, at 27-28.

162. *Id.* at 30-31.

163. Attorney Gen. John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001) ("Let the terrorists among us be warned: If you overstay your visa – even by one day – we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute.").

164. *Id.* ("We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution . . .").

165. *Id.*

166. *Id.*

167. Memorandum from the Deputy Attorney Gen. of the United States, to all United States Attorneys and all Members of Anti-Terrorism Task Forces (Nov. 9, 2001) (on file with author).

168. *Id.*

169. *Id.*

enforcement agencies asked by the federal government to participate in the interviewing program refused to do so, because the program would destroy the relationships they had worked hard to build with Arab and Muslim communities in the United States.<sup>170</sup> A number of former FBI officials publicly opposed and even ridiculed the program.<sup>171</sup> Nevertheless, the DOJ pressed forward and conducted the interviews and then extended the interview program to another 3,000 people.<sup>172</sup> When the Government Accountability Office (GAO) studied the program at the direction of Congress, the DOJ told them the program had been a success, because it had created relationships and gathered important information.<sup>173</sup> However, spokespersons admitted that the DOJ had not performed any systematic study or investigation of its efforts or provided results that would justify such a view.<sup>174</sup> What the interview program undoubtedly did, though, was generate a list of suspects, their personal information, and contacts with other individuals that the FBI could use later against persons on the list.<sup>175</sup>

During the twelve months after the attacks, the Bush administration began using a tactic that upped the ante further: they declared three individuals to be “enemy combatants.”<sup>176</sup> While the term was not new, its use and context were. The government had detained all three individuals, Yasser Hamdi, Jose Padilla, and Ali al Marri, as terrorist suspects. Hamdi, an American citizen, was taken into custody on the battlefield in Afghanistan;<sup>177</sup> Padilla, also an American, was arrested in Chicago, Illinois;<sup>178</sup> and al Marri, a citizen

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170. Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1.

171. Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism: Detention of Suspects Not Effective, They Say*, WASH. POST, Nov. 28, 2001, at A1 (deriding the interview program as an ineffective and damaging effort, likely to come up with nothing more incriminating than “the recipe to Mom’s chicken soup”).

172. Philip Shenon, *Justice Dept. Wants to Query More Foreigners*, N.Y. TIMES, Mar. 21, 2002, at A19.

173. U.S. GEN. ACCOUNTABILITY OFFICE, HOMELAND SECURITY: JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, GAO-03-459 (2003). In actuality, the GAO reported that internal law enforcement views of the program were more mixed, “with some law enforcement officials indicating that the project helped build ties between law enforcement and the Arab community, while others indicated that the project had a negative effect on such relations.” *Id.* at 17.

174. *Id.* (noting that the Department of Justice “had no specific plans for conducting a comprehensive assessment of lessons learned from the project”).

175. *See id.* at 21-27 (GAO Report’s Appendix I).

176. A presidential order allowed those designated as “enemy combatants” to be detained. *See* Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (Supp. IV 2004).

177. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

178. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004).

of Qatar, was arrested in Peoria, Illinois.<sup>179</sup> All three were designated enemy combatants by order of President Bush, based on his power as commander in chief.<sup>180</sup> These presidential orders were factually grounded in short affidavits submitted by mid-level officials of the Department of Defense.<sup>181</sup> Once designated as enemy combatants, the men were put in military custody, held in isolation, and not allowed to have counsel or other visitors.<sup>182</sup> They faced – and could defend against – no charges, and there would be no trials. The government contended that their detention could effectively be indefinite, with no access to the court system to challenge their confinement.<sup>183</sup> The Supreme Court eventually reined in some of the government’s power over enemy combatants in *Hamdi v. Rumsfeld*, mandating that the enemy combatants receive at least some semblance of due process.<sup>184</sup> Nevertheless, no court has ever overruled the presidential power to declare someone an enemy combatant by fiat.

In August 2002, truly disturbing reports surfaced. Attorney General Ashcroft reportedly began to consider the use of internment camps for all of those who might be designated enemy combatants in the future.<sup>185</sup> An article in the *Los Angeles Times* said that Ashcroft wanted a plan in place “for camps for U.S. citizens he deems to be ‘enemy combatants’” and that the plan “would allow him to order the indefinite incarceration of U.S. citizens and summarily strip them of their constitutional rights and access to the courts.”<sup>186</sup> Just a few weeks later, CNN reported on its website that “Attorney General Ashcroft and the White House are considering creating a military detention camps [sic] for all U.S. citizens deemed by the administration to be enemy combatants.”<sup>187</sup> The DOJ neither confirmed nor denied these reports;

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179. *al Marri v. Wright*, 487 F.3d 160, 163-64 (4th Cir. 2007), *rev’d in part en banc sub nom. al Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated and remanded sub nom. al Marri v. Spagone*, 129 S. Ct. 1545 (2009).

180. *Hamdi*, 542 U.S. at 509-10; *al-Marri*, 487 F.3d at 163; Memorandum from George W. Bush, President of the U.S., to the Sec’y of Def. & the Attorney Gen. Declaring Jose Padilla an Enemy Combatant (June 9, 2002), *available at* <http://pacer.ca4.uscourts.gov/opinion.pdf/056396.P.pdf>.

181. *See, e.g.*, Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002), *available at* <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf>.

182. *See, e.g.*, *Hamdi*, 542 U.S. at 510-11.

183. *See, e.g.*, *id.*

184. *Id.* at 524-25, 533-36 (finding enemy combatants may be detained without trial but must be accorded basic aspects of due process, such as notice of charges and opportunity to be heard).

185. Jonathan Turley, Commentary, *Camps for Citizens: Ashcroft’s Hellish Vision*, L.A. TIMES, Aug. 14, 2002, at 11.

186. *Id.*

187. Anita Ramasastry, *Why Ashcroft’s Plan to Create Internment Camps for Alleged Enemy Combatants is Wrong*, CNN.COM, Sept. 4, 2002, <http://archives.cnn.com/2002/LAW/08/columns/fl.ramasastry.detainees/>.



the *Wall Street Journal* was able to get “a senior administration official” to confirm that a plan was in the works to make the facility holding Jose Padilla ready for as many as twenty enemy combatants.<sup>188</sup> Some thought there was little truth to this story,<sup>189</sup> and no official policy for establishing camps ever emerged. Perhaps the true measure of its importance was that it was reported to be a possibility and that it raised citizen concerns.

Were any of these actions – the round up of Muslim men, the interviews of thousands of “non-suspects,” the designation of enemy combatants, or the rumored plans of detention camps – either individually or together the equivalent of the internment of the Japanese? Certainly not. Thankfully, nothing on that scale has occurred. But, viewed together, a person concerned enough to look for a pattern could easily discern one. It was not outrageous at all to think that the Bush administration might, indeed, be reaching for the “loaded weapon” that was *Korematsu*.

Therefore, the question remains. Is the U.S. government, in fact, doomed to repeat the mistake of *Korematsu* in the event of another attack?

### III. THE WAY TO AVOID A REPETITION OF *KOREMATSU*: “LIBERTY LIES IN THE HEARTS OF MEN AND WOMEN...”

Despite the continuing vitality of the legal principle of *Korematsu*, the desire of some to allow internment as a security measure for the post-9/11 world, and some of the frightening measures taken by the government after 9/11, the nation is not doomed to repeat the mistake of *Korematsu* in the event of another attack. This is not because of the Constitution generally, the Equal Protection Clause specifically, or even the pronouncements by the Court’s current members on *Korematsu*. If modern America avoids the colossal blunder of *Korematsu*, it will be for a different reason. To understand why, one must look back to 1944, the year the Supreme Court decided *Korematsu*.

On May 21, 1944, thousands of people came to New York City’s Central Park for a ceremony called “I am an American Day.”<sup>190</sup> The crowd contained a number of people taking the oath of citizenship, mixed in with na-

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188. Jess Bravin, *More Terror Suspects May Sit in Limbo – White House Seeks to Expand Indefinite Detentions in Military Brigs, Even for U.S. Citizens*, WALL ST. J., Aug. 8, 2002, at A4 (“The Goose Creek, [South Carolina], facility that houses [Jose] Padilla – mostly empty since it was designated in January to hold foreigners captured in the U.S. and facing military tribunals – now has a special wing that could be used to jail about 20 U.S. citizens if the government were to deem them enemy combatants, a senior administration official said.”).

189. See, e.g., John Hawkins, *Does John Ashcroft’s ‘Camp Plan’ Actually Exist?*, RIGHT WING NEWS, <http://www.rightwingnews.com/john/camp.php> (last visited Oct. 29, 2010).

190. THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189 (Irving Dillard ed., 1952).

tive-born Americans.<sup>191</sup> Judge Learned Hand, one of the most revered U.S. judges in the twentieth century,<sup>192</sup> addressed the throng.<sup>193</sup> His brief remarks became almost instantly famous. Judge Hand talked about what brought people to America, and what immigrants to the country all sought, in one form or another: liberty.<sup>194</sup> He tried to explain what liberty meant. Perhaps surprisingly for a well-known judge, Hand said that his idea of liberty did not stand first and foremost upon the law: "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts."<sup>195</sup> He called these hopes "false hopes."<sup>196</sup> Something less concrete and more abstract is worthy of our confidence. "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court . . . can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."<sup>197</sup>

Judge Hand's belief that neither the constitution nor laws can save us from our worst instincts foretold exactly what happened just a little more than six months later, when the Supreme Court upheld the internment in *Korematsu*. Judge Hand's essential idea – that freedom and liberty survive not through the intervention of courts, but through what the people demand – found expression in Justice Jackson's *Korematsu* dissent. "If the people ever let command of the war power fall into irresponsible and unscrupulous hands," Jackson wrote, "the courts wield no power equal to its restraint. The chief restraint . . . must be their responsibility to the political judgments of their contemporaries and the moral judgments of history."<sup>198</sup>

Thus, the majority opinion in *Korematsu* cemented into American constitutional law the principle that the government could incarcerate a whole race of people, tens of thousands of whom held American citizenship, without any process, in the name of national security during wartime. With the threat from the Japanese empire, neither the Constitution's Equal Protection Clause nor the Court's interpretation of it kept the government from imprisoning an **entire ethnic group**. **Liberty did not stir in the hearts of America's leaders**, as President Roosevelt, numerous high-ranking government officials, and military officers supported the internment.<sup>199</sup> Neither did liberty awake in the hearts of the American people themselves. The American Civil Liberties Union, then, as now, a pre-eminent proponent of constitutional rights, did not stand up for the Japanese. In an internal referendum, the organization's na-

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191. *See id.*

192. To get a sense of the scope of Hand's judicial career and his profound impact on the law, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

193. *THE SPIRIT OF LIBERTY*, *supra* note 190.

194. *Id.*

195. *Id.* at 189-90.

196. *Id.*

197. *Id.* at 190.

198. *Korematsu v. United States*, 323 U.S. 214, 248 (Jackson, J., dissenting).

199. *See supra* notes 10-12 and accompanying text.

tional leadership decided not to criticize the internment or the presidential order upon which it was based.<sup>200</sup> Even the Japanese American Citizens League (JACL), the most prominent civic organization representing Japanese people at the time, did not take a position opposing the internment.<sup>201</sup>

Fast-forward fifty-seven years to the terrorist attacks of September 11, 2001. Americans were wounded, shocked, terrified, and grief stricken – similar in many ways to how the nation felt after December 7, 1941. It was a time of great fear and terrible anger directed toward the attackers who came from one ethnic group, and with that came a desire to act, to do anything in order to secure themselves from another attack. But even as the government began, almost immediately, to find and imprison young Arab and Muslim men,<sup>202</sup> the events following the 9/11 attacks were different in at least one crucial respect from the events that followed the Japanese attack in 1941. Liberty, it seemed, had taken root in the hearts of Americans, exactly as Judge Learned Hand had said it would.<sup>203</sup> This time, amidst the calls for revenge, some Americans and their civic organizations immediately urged caution in order to avoid repeating the mistakes the nation had made in the past. And these efforts made a difference. As Professor Eric Muller noted, the government's responses to the 9/11 attacks might have been much more extreme, but for the fact that, at "key moments, articulate voices . . . challenged the government's plans."<sup>204</sup> This willingness to speak up in order to temper the tendency to take repressive actions transformed the words of Judge Hand in 1944 into reality. Among those urging restraint in response to 9/11 most strongly were Japanese Americans – former internees, their descendants, and their organizations. Given what they and their kinsmen had lived through in the not-so-distant past, they took it as their mission to prevent anything remotely like the Japanese internment from happening again.

It is important not to oversell the efficacy of what Japanese Americans did after the 9/11 attacks. It is impossible to know whether the actions of Japanese Americans and their organizations *caused* the government to hold back on something it would have done if not for their objections. Similarly,

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200. IRONS, *supra* note 28, at 128-34 (detailing the struggle on the ACLU's national board on these questions, in which those favoring support for the President and the war effort eventually triumphed, resulting in withdrawal of ACLU support from any contrary effort). One ACLU affiliate branch – the Northern California affiliate, located in San Francisco, refused to abide by this policy, having undertaken cases challenging the internment orders before the "no challenge" policy went into effect. *Id.* at 130-32.

201. This happened, in no small measure, because of the Japanese American Citizens League's entanglement with the military and intelligence authorities; some in the JACL began to serve as confidential informants for the government, providing the names of persons who might have sympathies for the Japanese Empire. *Id.* at 79-81.

202. See *supra* notes 153-66 and accompanying text.

203. THE SPIRIT OF LIBERTY, *supra* note 190, at 190.

204. Muller, *supra* note 40, at 592.

and fortunately, Japanese Americans were not alone in responding to 9/11 with calls for restraint. Among those organizations that took public positions and actions against extreme responses were the ACLU,<sup>205</sup> the Center for Constitutional Rights,<sup>206</sup> and Human Rights Watch.<sup>207</sup> What made the Japanese Americans' response worth noting was its speed, its unambiguous nature, and, perhaps most importantly, the fact that it drew its moral authority from *Korematsu* and the Japanese American internment itself.

The primary vehicle for the expression of post-9/11 positions of the Japanese American community was JACL<sup>208</sup> – the same organization that did not stand up for the interests of Japanese people in 1942.<sup>209</sup> In 2001, the JACL showed an immediate grasp of the risks of overreaction to the terrorist attacks. In a situation in which rage, fear, and calls for vengeance seemed the order of the day, standing against the tide of national feeling took great forti-

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205. The ACLU has been one of the leading organizations in every aspect of opposing the government's assertions of power in the aftermath of 9/11. The organization has been especially active in eliciting information from the government regarding its misdeeds, especially regarding allegations of torture. *See, e.g.*, News Release, Upsetting Checks and Balances: Congressional Hostility to Courts in Times of Crisis, Statement of Anthony D. Romero (Nov. 1, 2001), <http://www.aclu.org/national-security/upsetting-checks-and-balances-congressional-hostility-courts-times-crisis-statement-2> (warning that Americans must remain vigilant not just against terrorism, but against encroachments on civil liberties); Media Advisory, In Defense of Freedom: Broad New Coalition Calls for Reasoned Debate to Protect National Security and Crucial American Freedoms (Sept. 19, 2001), <http://www.aclu.org/national-security/broad-new-coalition-calls-reasoned-debate-protect-national-security-and-crucial-am> (explaining that leaders of numerous organizations would join the leaders of the ACLU to sign and "release a 10-point statement of principles demonstrating [their] solidarity with the nation and its leaders and offering guidance for the preservation of freedom and civil liberties in the wake of the events of September 11th").

206. For example, the Center for Constitutional Rights was central in bringing the four cases on the rights of enemy combatants that went to the Supreme Court. *See supra* notes 138-47 and accompanying text.

207. *See, e.g.*, News Release, 'We Are Not the Enemy': Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim After September 11 (Nov. 14, 2002), <http://www.hrw.org/en/reports/2002/11/14/we-are-not-enemy> (discussing prevalence of hate crimes against Arabs, Muslims, and those who look like them since the September 11 attacks); News Release, Torture Not an Option: Human Rights Watch Issues Backgrounder (Nov. 19, 2001), <http://www.hrw.org/en/news/2001/11/19/torture-not-option-0> (arguing against the use of torture or truth serum to get information from suspected terrorists); News Release, Human Rights Watch Response to Attacks on the U.S.: Civilian Life Must Be Respected (Sept. 12, 2001), <http://www.hrw.org/en/news/2001/09/12/human-rights-watch-response-attacks-us> (arguing that in response to the 9/11 attacks, the U.S. government must not take actions that injure innocent civilians).

208. Japanese American Citizens League, About the Japanese American Citizens League, <http://www.jacl.org/about/about.htm> (last visited Oct. 31, 2010).

209. *See supra* note 201 and accompanying text.

tude. Yet the JACL and other groups allied with it quickly and unequivocally spoke up to remind the U.S. government of the terrible mistake made in *Korematsu*.<sup>210</sup>

The first example came almost at once. On September 12, 2001, the day following the attacks, the JACL issued a statement reflecting, first, the terrible sense of loss many Americans felt,<sup>211</sup> but also cautioning against blaming people from the same ethnic and religious groups as the attackers.<sup>212</sup> Recalling the experiences of Japanese Americans, JACL National President Floyd Mori appealed for calm, making a direct comparison between what had happened to the Japanese during the early 1940s. He noted what could happen to Arab Americans or Muslims in the aftermath of the 9/11 attacks:

We urge citizens not to release their anger on innocent American citizens simply because of their ethnic origin, in this case Americans of Arab ancestry. While we deplore yesterday's acts, we must also protect the rights of citizens. *Let us not make the same mistakes as a nation that were made in the hysteria of WWII following the attack at Pearl Harbor.*<sup>213</sup>

Given the mass death and great devastation witnessed in real time by millions of Americans and the outpouring of national grief and anger that hung in the air like debris from the attacks, the JACL's September 12 statement was, in every way, an act of courage. The organization saw immediately, as few others did, what the situation could become: an occasion that might move the nation toward repeating the mistake of *Korematsu*. The group stood up and said so, perhaps before many Americans and their leaders were ready to hear it.

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210. Other organizations joined the JACL in this discussion, such as the National Asian Pacific American Legal Consortium. See, e.g., U.S. Comm'n on Civil Rights, Briefing on Boundaries of Justice: Immigration Policies Post September 11, at 5 (2001), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr182im6.pdf> (testimony of Karen Narasaki, President and Executive Director of the National Asian and Pacific American Legal Consortium).

211. News Release, JACL Urges Caution in Aftermath of Terrorist Attack (Sept. 12, 2001) (on file with author) ("In the aftermath of yesterday's horrific and deliberate acts of terrorism, all Americans are reeling in disbelief and sorrow, and are united in a sense of outrage at those who committed these heinous acts. The Japanese American Citizens League (JACL) joins the millions across the country and the world who mourn this tragic loss of life, livelihood and peace of mind.").

212. *Id.* ("[T]he JACL is deeply alarmed over reports that some Arab Americans and Muslims have already been targeted and mistreated by their fellow Americans as perpetrators of yesterday's tragedy. The organization expressed grave concerns that yesterday's terrorism not lead to further tragedy with Arab Americans and Muslims being collectively blamed or specifically pursued as scapegoats through unsubstantiated accusations or biased treatment by investigative agencies or the public.").

213. *Id.* (emphasis added) (internal quotation marks omitted).

By August 2002, the government's reactions to the attacks had taken shape. By that point, federal agents had arrested hundreds of young Arab and Muslim young men, incarcerated them, and deported them.<sup>214</sup> President Bush declared the first individuals "enemy combatants" without rights, and the military held them in military brigades, without even the thinnest veneer of due process.<sup>215</sup> The FBI had interviewed thousands of Arab and Muslim male "non-suspects."<sup>216</sup> Attorney General Ashcroft had testified in the U.S. Senate that critics of the Administration's anti-terrorism policies gave aid and comfort to the terrorists, calling them traitors.<sup>217</sup> In this atmosphere, reports surfaced that Attorney General Ashcroft was considering the creation of detention camps in the United States.<sup>218</sup>

The JACL confronted Attorney General Ashcroft immediately and publicly over the detention camp plan, saying "[t]he JACL believes that the attorney general plays dangerously with the individual protections guaranteed by the Constitution."<sup>219</sup> While the JACL understood the need to promote national security and to "aggressively pursue" those who had attacked the nation, the security of the nation also depended on "a strong adherence to the spirit and intent of our constitutional protections."<sup>220</sup> Just as it had on the day after the 9/11 attacks, the organization directly invoked the experiences of Japanese Americans during the internment to oppose the idea of camps for all declared enemy combatants in the war on terror.

Japanese Americans were interned in concentration camps during World War II. In 1942, government authorities knew full well that Japanese Americans posed no risk to the security of the United States. Yet, without charges of wrongdoing, without benefit of legal system, Japanese Americans were summarily rounded up and incarcerated. Furthermore, when legal cases challenging this action were heard by the Supreme Court, government authorities

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214. See *supra* notes 153-66 and accompanying text.

215. See *supra* notes 176-84 and accompanying text.

216. See *supra* notes 167-75 and accompanying text.

217. *Testimony of John Ashcroft, Attorney General, Before the S. Comm. on the Judiciary*, 107th Cong. (2001), <http://www.justice.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm> ("To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists – for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.").

218. See *supra* notes 185-89 and accompanying text.

219. Press Release, Statement of the Japanese American Citizens League (JACL) on the Detention Camp Proposal by A.G. John Ashcroft (Aug. 16, 2002) (on file with author).

220. *Id.*

suppressed evidence about the true nature of the threat posed by our community.<sup>221</sup>

The JACL carried this message forward again on September 11, 2002, the first anniversary of the attacks. Like almost all Americans and their public advocacy organizations, the JACL expressed its sorrow over the terrible losses caused by the attacks.<sup>222</sup> But once again, the JACL did not stop with an expression of grief. Instead, they took it as their particular obligation to caution the government and their fellow citizens against repeating the mistake of *Korematsu*. The JACL renewed its appeal to the government and the people of the U.S. to remember the mistake of the internment. "America was built on values of democracy and fairness and recognizes today that scapegoating in 1942 was a mistake – and that we cannot allow such a fundamental injustice to be repeated ever again."<sup>223</sup>

To be sure, other organizations cautioned against government overreaching in the wake of the 9/11 attacks; the JACL surely did not stand alone. Nevertheless, the JACL and other Japanese American groups saw the danger immediately and understood that the experiences of their own community formed the essential historical context for government actions against Arabs and Muslims. Because of their own internment experience, they reacted immediately, aligning themselves with a suddenly unpopular minority without hesitation, and their unambiguous opposition carried a moral authority that other groups could not match.<sup>224</sup>

As for individuals, one person stands out in the events following 9/11 to merit particular mention: Norman Mineta. Mineta, the former mayor of San Jose, California won election to the U.S. House of Representatives as a Democrat in 1975.<sup>225</sup> During his twenty years of service in Congress, he developed an expertise in transportation issues.<sup>226</sup> He left Congress in 1995 but returned to government as the Clinton Administration's Secretary of Com-

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221. *Id.*

222. John Tateishi, JACL Statement on September 11th Anniversary (Sept. 11, 2002) (on file with author).

223. *Id.*

224. Also note that the JACL has remained active on these issues well beyond the examples quoted here. See, e.g., Press Release, Japanese Am. Citizens League, Habeas Corpus Comments by Attorney General Gonzales Are Criticized by JACL (Feb. 2, 2007), [http://www.jacl-ncwnp.org/\\_files/user/JACL\\_HabeasCorpus\\_PR.pdf](http://www.jacl-ncwnp.org/_files/user/JACL_HabeasCorpus_PR.pdf) (objecting to Gonzales' congressional testimony in which he said that the Constitution does not assure every American the right to a writ of habeas corpus, pointing out that Gonzales' statement was directly contradicted just three years before by the U.S. Supreme Court, and explaining that "[t]he right to habeas corpus was at the core of the World War II incarceration of 120,000 individuals of Japanese Ancestry").

225. U.S. Department of Transportation, Norman Y. Mineta, <http://www.dot.gov/affairs/mineta.htm> (last visited Oct. 31, 2010).

226. *Id.*

merce in 2000 and 2001.<sup>227</sup> President George W. Bush appointed Mineta Secretary of Transportation in 2001,<sup>228</sup> a position in which he served until he resigned in 2006.<sup>229</sup> As Transportation Secretary, Mineta oversaw the nation's aviation system during the 9/11 terrorist attacks. On that day, from a bunker underneath the White House, Mineta ordered every civil aircraft in the sky over the United States to land immediately, shutting down the system to prevent any further attacks.<sup>230</sup> Mineta's department moved quickly to increase airline security, tighten airport screening, and call for the physical modification of airliners to guard against attacks.<sup>231</sup>

In the months after the attack, many Americans called for the use of profiling against Arabs and Muslims. Many argued that it just made sense to give increased and detailed scrutiny to Arab or Muslim men (like those who had attacked the nation on 9/11) instead of to any other person or group.<sup>232</sup> In contrast to the do-anything-for-safety thinking fashionable at the time, Mineta publically espoused a different view. In a speech in April of 2002, Mineta explained his position, acknowledging an avalanche of sharp criticism and attacks for refusing to allow profiling by Department of Transportation employees at airports.<sup>233</sup> The Department of Transportation had already done

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227. *Id.*

228. *Id.*

229. Academy of Achievement, Norman Y. Mineta Biography, <http://www.achievement.org/autodoc/page/min0bio-1> (last visited Nov. 15, 2010).

230. Norman Y. Mineta, Sec'y of Transp., Statement Before The National Commission on Terrorist Attacks Upon the United States 5-6 (May 23, 2003), [http://govinfo.library.unt.edu/911/hearings/hearing2/witness\\_mineta.pdf](http://govinfo.library.unt.edu/911/hearings/hearing2/witness_mineta.pdf).

231. *Id.* at 10-11 (detailing changes, including modifications to screening, cockpit doors, and flight deck access).

232. See, e.g., Stanley Crouch, Commentary, *Wake Up: Arabs Should Be Profiled*, ST. LOUIS POST-DISPATCH, Mar. 19, 2002 ("So if pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is the unfortunate cost they must pay to reside in this nation."); Stuart Taylor, Jr., *Politically Incorrect Profiling: A Matter of Life and Death*, 33 NAT'L J. 3406, 3406 (2001) ("What would happen if another 19 well-trained Al Qaeda terrorists, this time with 19 bombs in their bags, tried to board 19 airliners over the next 19 months? Many would probably succeed, blowing up lots of planes and thousands of people, if the forces of head-in-the-sand political correctness prevail - as they did before September 11 - in blocking use of national origin as a factor in deciding which passengers' bags to search with extra care.").

233. Norman Y. Mineta, U.S. Sec'y of Transp., Remarks to the Arab Community Center for Economic and Social Services Gala Dinner 2 (Apr. 20, 2002) (on file with author) ("As you are so very well aware, some commentators have been critical that the Administration has not engaged in large-scale profiling at airports in the wake of September 11."). Among Mineta's sharpest critics was Michelle Malkin, the author of *In Defense of Internment*, who called repeatedly for Mineta's firing because he would not allow profiling; his own experience with internment had clouded his judgment. See MALKIN, *supra* note 124, at xxi-xxii; see also *Michelle Malkin Defended WWII Internment, Racial Profiling Today; Said Mineta's View "Clouded" by His*



much, and would do much more, to improve aviation security. But under Mineta's watch, it would not engage in racial or ethnic profiling of Arabs or Muslims. Using race or ethnic appearance when law enforcement or security forces have information regarding the racial identity of those involved in a planned crime would be acceptable, "[b]ut there is a firm distinction between that situation, and one where a law enforcement officer is willing to assume, based on no other reason than race alone, that a particular person is likely to be a criminal – or a terrorist."<sup>234</sup> The former constitutes good police or security work; the latter does not.

[R]outinely pulling passengers out of line and subjecting them to searches need not, and should not, be done on the basis of race. Establishing such a policy would be counterproductive to our efforts to build a solid basis for aviation security. . . . [We] cannot, we must not, and we will not assume that all future terrorists will fit that particular profile. Without more information, we simply cannot tell – and it certainly has not been true in the past.<sup>235</sup>

Mineta went on to explain his understanding of the issue. First, he cited examples of terrorists using profiles to beat security systems by doing the opposite of what the profile is calibrated to find.<sup>236</sup> But second, for Mineta, the question of profiling – that is, of group guilt based on racial or ethnic

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*Internment*, MEDIA MATTERS FOR AM., Aug. 10, 2004, <http://mediamatters.org/research/200408110001> ("And then there's, if the Bush administration wants to do one single concrete thing, it could get rid of Norm Mineta, who embodies this problem. He is somebody who experienced the evacuation during World War II. He was evacuated to a camp in Heart Mountain, Wyoming. And it has clouded, it has absolutely clouded his view of what needs to be done now."). But many others were equally strident. See Ann Coulter, *Mineta's Bataan Death March*, JEWISH WORLD REV., Feb. 28, 2002, <http://www.jewishworldreview.com/cols/coulter022802.asp> ("Secretary Mineta is burning with hatred for America. He has taken the occasion of the most devastating attack on U.S. soil to drone on about how his baseball bat was taken from him as a child headed to one of Franklin Roosevelt's Japanese internment camps."); Rich Lowry, *Mineta's Folly*, NAT'L REV., Jan. 10, 2002, <http://www.nationalreview.com/lowry/lowry011002.shtml> ("Transportation Secretary Norman Mineta may not necessarily be the least impressive Bush cabinet secretary – there's competition there – but he is certainly the most dangerous. . . . On the issue of profiling, Mineta's ignorance appears to be nearly invincible."); Peggy Noonan, *The Other Shoe: Obsessing over Sept. 11 Distracts us from Preventing the Next Attack*, WALL ST. J., June 7, 2002, <http://www.opinionjournal.com/columnists/pnoonan/?id=110001808> ("Mr. Mineta has received many awards for his sensitivity to ethnic profiling. Good for him, but I'd personally give him an award if he'd begin to act like a grownup and recognize that his childhood trauma shouldn't determine modern American security policy.").

234. Mineta, *supra* note 233.

235. *Id.* at 3.

236. See *id.* at 4.

background – was deeply personal. As a child, Mineta had been an internee himself. Along with his family, the young Mineta – then a baseball-crazy boy scout – had spent the war years imprisoned at the Hart Mountain internment camp in Wyoming.<sup>237</sup> This experience clearly left its mark on him. His refusal to use large-scale racial profiling represented a determination that he, unlike American officials in the 1940s, would not allow the present crisis to divide the country by race. “From my own life,” Mineta said in his speech, “I can tell you – it has not always been this way.”<sup>238</sup>

Based on speeches like this one and comments he made in media outlets, such as when he noted that his refusal to allow racial profiling in airports was his proudest achievement,<sup>239</sup> critics kept up their vicious attacks on Mineta. Nevertheless, Mineta proceeded as he said he would, refusing to yield to calls for profiling throughout his tenure as Secretary of Transportation.

#### IV. CONCLUSION

The common perception that *Korematsu* is dead is just plainly incorrect. In fact, *Korematsu* remains very much alive, and in the post-9/11 world, there are many who want it fully rehabilitated and ready for use. They want the central principle in the case, what Justice Jackson called a “loaded weapon,” readily available in this new era in which we face a new threat from a homogenous, external group.

This forces Americans to ask whether something like the Japanese American internment could ever happen again. Given what the nation knows now, the question has two answers. Yes, the law and the Constitution could permit this to happen again – put differently, the Constitution would not stop it. But the other answer comes from Judge Learned Hand’s instruction that, in the end, Americans need more than the Constitution to make them free. Real freedom – liberty itself – must come from the people themselves, from their hearts.

The reaction to the government’s actions in the wake of the terrorist attacks of September 11, 2001 tells us that, unlike in 1944, we can see that liberty does indeed live in the hearts of Americans. The actions of Japanese Americans, first among those to caution against the potential for government excess, tell us much about how we have taken Judge Hand’s ideas to heart and internalized them. It appears Americans have learned something from *Korematsu* – at least enough of them have – that when the specter of internment arises, some Americans speak up and say no. And the lesson of history is that, when some people stand against injustice, others will gather courage from them and may follow. That is what will prevent another internment,

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237. Academy of Achievement, *supra* note 229.

238. Mineta, *supra* note 233, at 7.

239. *60 Minutes* (CBS television broadcast Aug. 11, 2002) (interview by Steve Kroft with Norman Mineta, Secretary of Transportation).

even though *Korematsu* remains alive on the pages of the law books. What Judge Hand said was true: when liberty is alive in the hearts of men and women, it is bigger and more important than the law.<sup>240</sup>

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240. THE SPIRIT OF LIBERTY, *supra* note 190, at 190.